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Supreme Court of [redacted]

[redacted]

October Term, [redacted]

[redacted]

No. [redacted]

[redacted]

BARBARA J. [redacted],
Arthur J. [redacted],

Petitioners,

v.

UNITED STATES STEEL CORPORATION
and
DEN NORSKE AMERIKALINJE A/S,

[redacted]

PETITION FOR WRIT OF [redacted]
UNITED STATES [redacted]
FOR THE SIXTH CIRCUIT

[redacted]

[redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No.

BARBARA J. FUHRMAN, ADMINISTRATRIX OF THE ESTATE OF ARTHUR J. FUHRMAN, DECEASED, ET AL.,
Petitioners,

v.

UNITED STATES STEEL CORPORATION
and
DEN NORSKE AMERIKALINJE A/S.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Barbara J. Fuhrman, Administratrix of the Estate of Arthur J. Fuhrman, deceased, Marion Jones, Administratrix of the Estate of Eugene F. Jones, deceased, Elizabeth Haske, Administratrix of the Estate of Stanley Haske, deceased, Billy R. Holley, Michael Idalski, Jerome Kierzek, Raphael Przybyla, Walter Tulgetske, Stanley P. Mulka and Ronald G. Piechan, respectfully pray that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled matter on December 23, 1970.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court for the Northern District of Ohio, Eastern Division, is unreported (*infra*, p. A3). The opinion of the Court of Appeals for the Sixth Circuit is reported at F. 2d (*infra*, p. A8).

JURISDICTION.

The judgments of the Court of Appeals were entered on December 23, 1970 (*infra*, p. A 52-57). The jurisdiction of this Court is invoked under 28 U. S. C. A. § 1254(1).

QUESTIONS PRESENTED.

1. Where, in an admiralty proceeding to assess damages for death and personal injury from a maritime disaster, there is factual and medical testimony concerning the collision and sinking, the injuries sustained, and the losses suffered, and the damage Commissioners, who saw and heard the witnesses, and the District Judge, made findings of fact thereon, did not the reviewing court act in direct conflict with the decision of this Court in *McAllister v. United States*, 348 U. S. 19 (1954), and with the decisions of other circuits [1] in applying F. R. C. P. 52(a) and the "clearly erroneous" rule, by completely disregarding said

1. Second Circuit: *Carroll v. United States*, 133 F. 2d 690 (1943); *Castro v. Moore-McCormack Lines, Inc.*, 325 F. 2d 72 (1963).

Fifth Circuit: *Grigsby v. Coastal Marine Service of Texas, Inc.*, 412 F. 2d 1011 (1969); *Daniels Towing Service, Inc. v. Nat Harrison Assoc.*, 432 F. 2d 103 (1970).

findings of fact, despite the admittedly existing evidence, because it disbelieved testimony which was accepted below and disagreed with the findings of fact based thereon?

2. Did the Court below err in completely setting aside all of the psychiatric testimony which was accepted and considered by the Trial Judge because it found the testimony "incredible" and because this expert testimony was based upon history given by the claimants to the physician, which holdings are in direct conflict with the law enunciated by the Second,[2] Seventh,[3] and District of Columbia[4] Circuits, which hold that a physician who examined for purposes of testifying may properly state the history given to him as basis for his conclusion?

3. Did the Court below err in measuring the seamen's future loss of earning capacity resulting from maritime disaster by taking the actual earnings before and after the injury, and basing it on actual loss of *earnings*, rather than on earning *capacity*, and thereby announce a rule which limits losses to the past and immediate present earnings, rather than considering the "whole economic horizon" of the claimant and "all relevant factors" as is held to be the law in the Second,[5] Third,[6] Fourth,[7] and Eighth[8] Circuits.

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2. *Reid v. Quebec Paper Sales & Transp. Co.*, 340 F. 2d 34 (2d Cir. 1965).

3. *Spillers v. Tri-State Glass Lined Storage, Inc.*, 325 F. 2d 322 (7th Cir. 1963).

4. *City-Wide Trucking Corp. v. Ford*, 306 F. 2d 805 (D. C. Cir. 1962); *Kauffman v. Kauffman*, 164 F. 2d 519 (D. C. Cir. 1947).

5. *Alexandervich v. Gallagher Bros. Sand & Gravel Corp.*, 298 F. 2d 918 (1961); *Sylvestri v. Warner & Swasey Co.*, 398 F. 2d 598 (2d Cir. 1968).

6. *Wiles v. N. Y., C. & St. L. R. R.*, 283 F. 2d 328 (3d Cir. 1960); *Thompson v. Trent Maritime Co.*, 353 F. 2d 632 (3d Cir. 1965); *Johns v. Bal. & Ohio R. R.*, 239 F. 2d 385 (3d Cir. 1957).

7. *Lawrence v. Norfolk Dredging Co.*, 319 F. 2d 805 (4th Cir. 1963); *Carter v. United States*, 49 F. 2d 221 (4th Cir. 1931).

8. *United States v. Phillips*, 44 F. 2d 689 (8th Cir. 1930).

4. In vacating in full awards to the widows of deceased seamen for loss of consortium, care and guidance, did not the Court below misconceive and misapply the decision of this Court in *Michigan Central R. R. v. Vreeland,* 227 U. S. 59, 57 L. Ed. 417 (1913), wherein this Court recognized that "pecuniary loss" includes damages for "loss of services . . . care, counsel, training and education" which the wife or child might have reasonably received?

5. Where there is evidence of future decrease in the purchasing value of the dollar, did not the Court below err in overruling the trial court by refusing to consider this evidence of inflationary trend when reducing future damages to present value; was not such reversal of the District Court's counter-balancing the earning power of money with its actual purchasing power in conflict with the decision of this Court in *C. & O. Ry. v. Kelly,* 241 U. S. 485, 60 L. Ed. 1117 (1916)?

6. Did the Court below err in vacating the Trial Court's award of pre-judgment interest in admiralty and thereby failing to follow the principle enunciated by the Second Circuit?[9]

STATUTES AND RULE INVOLVED.

The statutory provisions involved are Merchant Marine (Jones) Act, 46 U. S. C. A. 688; Federal Employers' Liability Act, 45 U. S. C. A. 51. The procedural rule involved is F. R. C. P. 52(a). They are printed in Appendix A, *infra,* pp. A1-2.

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9. *Petition of City of New York,* 332 F. 2d 1006 (2d Cir. 1964); *Moore-McCormack Lines, Inc. v. Richardson,* 295 F. 2d 583 (2d Cir. 1961).

STATEMENT OF THE CASE.

On May 7, 1965, the S/S "Cedarville", owned and operated by United States Steel Corporation, departed Calcite, Michigan, in fog. Because of the negligence of U. S. Steel and Den Norske and the unseaworthiness of their vessels, the "Cedarville" came into collision with the M/S "Topdalsfjord", owned and operated by Den Norske, and a great gash was torn in the "Cedarville" so that her non-watertight compartments immediately started to flood and she started to sink at the rate of three inches per minute (R. 130a, 226a, 245a-246a, 316a-317a). After 15 minutes while the vessel was anchored, the vessel had lost about five feet of her freeboard (R. 201b). Another vessel, the M/V "Weissenburg", was standing by the stricken "Cedarville", vainly asking to take the crew aboard, but the master of the "Cedarville" refused (R. 391a-393a) and took a "gamble" in trying to reach shore in the fog (R. 247a, 391a-393a). During this period of time the "Cedarville" was in touch with shore officials of U. S. Steel by ship-to-shore radio. In this attempt, the "Cedarville" was traveling at the rate of two miles per hour (R. 179b). The men not on watch below were standing on the deck waiting for the order to abandon ship, which never came (R. 244a, 339a, 390a, 169b, 173b, 226b-227b). As the vessel proceeded at its snail's pace, the water came higher and higher to the ship's decks until the decks came awash. Still no order to abandon ship (R. 255a, 317a, 342a, 179b). The ship then convulsed, 40 minutes after the collision, turned over on its side, and sank, hurling most of the men into the icy waters, and taking with her those who were mercilessly trapped below. No order to abandon ship was ever given (R. 340a, 371a, 381a, 220b, 238b).

Being flung into the water was the climax for this crew, after watching the ship go down until her decks were

awash. They all faced death and were terror stricken. They struggled in the freezing water—for about 30 minutes, in the fog, until they were finally able to get aboard the life raft or the lifeboat. Sometime later they were found and taken aboard the "Weissenburg" (R. 399a, 479a, 207b, 221b, 223b).[10]

The surviving crewmen testified at length upon the issue of their damages. They told about their lives before the disaster, including their schooling and employment and pre-collision illnesses and injuries; the events and ordeal of May 7, 1965, their physical, emotional and mental conditions immediately after rescue, their medical treatment and convalescence, their physical, mental and emotional conditions and their lives and employment since the collision, comparing this with their pre-collision situations and their current conditions and disabilities.[11] The families

10. Claimants here demanded punitive as well as consequential damages. After extensive pre-trial discovery the defendants admitted their negligence and the unseaworthiness of their vessels, and the case went to trial on the count for punitive damages against U. S. Steel directly before the District Judge (as the Commissioner's hearings on compensatory damages proceeded). The District Judge found U. S. Steel guilty of willful, wanton misconduct as to both pre- and post-collision events and held said company liable for punitive damages. — F. Supp. — . The Court of Appeals for the Sixth Circuit reversed, holding that the "master's" actions were neither authorized nor ratified by U. S. Steel. 407 F. 2d 1143. This Court denied certiorari. *Fuhrman v. U. S. Steel Corp.*, — U. S. —, 26 L. Ed. 2d 542 (6/15/70).

The foregoing capsulization of events up to the sinking is based on the Record in said punitive damage proceeding. Record references in the next footnote and elsewhere in this Petition are to Appendix below in the instant proceeding. Page references preceded by "A" are to Appendix *infra*.

11. Holley, R. 1009-11, 1012; 1012-16; 1016-18; 1016-22; 1018-24; 1024-30.
Idalski, R. 1353-54, 1365; 1355-57; 1357-59; 1360-64; 1364-66; 1365-66.
Kierzek, R. 842-43; 844-48; 846-49; 847-48; 848-51, 867-68; 847, 848-52, 855, 868.
Mulka, R. 913-14; 914-17; 917-20; 917, 921, 920, 921, 922-24; 922, 924.

of those who did not survive the disaster testified about their decedents' lives, their schooling and past employment, their health and ambitions, their economic existence, and their family and home lives together, and relationships between husband and wife and father and child.[12]

Dr. Harold Dillon, an eminent neuropsychiatrist, examined and testified on behalf of the survivors. His high standing and qualifications in his specialty are not denied. He examined each of the survivors at length several times, and spoke, also, with some of their families. He testified as to his early and final conclusions as to each claimant, and gave his final diagnosis, explaining the basis for each. He also gave his opinion as to prognosis and future disability and any necessary or recommended treatment, stating the length of time and cost for each claimant.[13]

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11 (cont'd)

Piechan, R. 1164-66; 1165-70; 1169-71; 1170-72, 1173-74; 1172-75; 1174-77.

Przybyla, R. 1236-37; 1238-40; 1240-41; 1240-41; 1242-45, 1270-73; 1244-47, 1261, 1269-74, 1286.

Tulgetske, R. 1523-24; 1525-29; 1529-31; 1529-30, 1532; 1531, 1532-34, 1536, 1557; 1531, 1532, 1534-35, 1536, 1550, 1557.

12. Fuhrman, R. 492-508, 520, 526-28.
Haske, R. 19-20, 532-56, 573-77.
Jones, R. 581-97, 614-16.

13. Dr. Dillon is certified by the professional Boards in neurology and psychiatry. He is Chief of Psychiatry, University of Pennsylvania Division of Philadelphia General Hospital, and on the psychiatric staff of four hospitals; psychiatric consultant to the Peace Corps, the Veterans Administration and Pennsylvania Bureau of Vocational Rehabilitation. He is assistant professor of clinical psychiatry at University of Pennsylvania.

In its zeal to devalue the fact-findings of the Trial Court, the Court of Appeals committed serious error in adopting the completely irrelevant and unsupported view of a commissioner, in a case completely unrelated to the instant one. The Court of Appeals below adopted *in toto* the argument of U. S. Steel that Dr. Dillon was incredible because of what a commissioner had said in another case in Seattle, Washington: *Matter of Petition of Keystone Tankship Corp.*, In Admiralty, No. 16,994, W. D. Wash., No. Div. (The "Bunker Hill") (A14). Since the subject matter was opened by

Dr. Jacob Krause testified on behalf of Holley, Idalski, Piechan, Przybyla and Tulgetske. Dr. Krause's qualifications were not denied, either.[14] He examined the above claimants, had x-rays taken where necessary, and testified as to diagnosis and prognosis in each case, giving his opinion as to required treatment and future disability.

The two Commissioners, having seen and heard all of the fact and medical witnesses in extended hearings, filed their reports and recommendations (R. 61-155). The District Judge considered exceptions filed by all parties, and promulgated the Commissioners' Awards and Opinions and their findings of fact and conclusions of law as those of the Court, and entered said awards as judgments for all parties (A3-6). Accordingly, judgment was entered (A7).

The Court of Appeals, after actually retrying the facts found in the District Court, vacated absolutely the awards for certain losses, and remanded the cases for revision and re-evaluation downward of others. It made broad and substantial reversals in law, as well as in weight, sufficiency and competency of evidence. Nevertheless, the Court in-

13 (cont'd)

the Court below it is appropriate to make brief reference to that case in order that an eminent and reputable specialist be not irreparably damaged. The commissioner in the Seattle case was a practicing attorney, representing steamship and insurance companies. He was outraged at Dr. Dillon's testimony that each of the men was affected. So he asked the insurance company doctor if he agreed that all of the men could be affected. The insurance doctor answered "Yes", agreeing with Dr. Dillon. Notwithstanding this, the commissioner there castigated Dr. Dillon in a most unjust and irrelevant manner. Adopting, in this case, the credibility evaluation of a witness by a commissioner in another litigation, and thereby reversing the credibility evaluation by the Trial Judge in *this* case, is a shocking mode of appellate review.

14. Dr. Krause is certified by the American Board of Orthopedic Surgery. He is Assistant Professor of Orthopedic Surgery at Hahnemann Medical College, and is Assistant Chief in Orthopedics at Albert Einstein Medical Center.

structed the District Court to make its revised findings and re-evaluations on the basis only of the present record, after deletion of the extensive and substantial evidence which it found incompetent, including all of Dr. Dillon's testimony, with no leave to claimants to offer additional evidence based upon its revised version of the law (A8-51, A52-57).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I. The Action of the Court Below in Setting Aside the Fact Findings of the District Court Despite Supporting Evidence, Because the Court Disbelieved Such Evidence and Disagreed With the Findings Thereon, Was a Complete Misapplication of F. R. C. P. 52(a) and the "Clearly Erroneous" Rule, and in Direct Conflict With This Court's Ruling in McAllister v. United States, 348 U. S. 19 (1954), Which Held That Where There Is Evidence to Support the Trial Judge's Findings, by Balance of Probabilities and Inference, Such Findings Cannot Be Held on Review to Be Clearly Erroneous.

The Court of Appeals simply stated that the awards were excessive and it was therefore dissatisfied with the findings of fact made by the District Judge. It considered the claimants' ordeals, suffering and losses of much less significance than did the finders of fact, and disbelieved the psychiatric testimony, although the fact-finders believed it. But, giving voice to a recognition that the reviewing tribunal was not the proper judge of credibility, the Court decided that it was firmly convinced "that a mistake has been committed", and, further, that Dr. Dillon's testimony was inadmissible.[15] Such indirection by the Court below in order to give effect to its disbelief of witnesses who were believed by the proper fact-finder, was a total and substantial misuse of F. R. C. P. 52(a) and the "clearly erroneous" rule as implemented and applied by this Court.

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15. Thus, the Court below stated that its inclination to discredit the psychiatric testimony was strong (A14), but being by law "required to accept that testimony unless we possess . . . a definite and firm conviction that a mistake has been committed" (A14), then proceeded to evade the law by deriving such "definite and firm conviction" from this very disbelief and "dissatisfaction with this testimony" (A14-16). As discussed, *infra*, this *ratio decidendi* grossly violates the law as announced by this Court.

This Court had the present issue before it in *McAllister v. United States*, 348 U. S. 19, 99 L. Ed. 20 (1954). There, the District Judge, sitting in admiralty without a jury, found that the Government, as shipowner, was negligent in permitting stevedores in a foreign port which was plagued by polio to use facilities aboard the ship, and that the plaintiff seaman thereby contracted the disease. The Court of Appeals held such findings to be "clearly erroneous". This Court reversed, holding that since there was evidence in the record from which the fact-finder could reasonably infer the facts which he found, the judgment of the trial court was "allowable". This Court said that while the Court of Appeals in that case had stated and applied the proper standard, it had applied it incorrectly and thereby reached the wrong result, in view of the existence of evidence in the record "from which the District Court could and did find" as it did (U. S. at 22, L. Ed. at 25). This Court concluded (U. S. at 22-3, L. Ed. at 25):

> "Of course no one can say with certainty that the Chinese were the carriers of the polio virus and that they communicated it to the petitioner. *But upon balance of the probabilities it seems a reasonable inference* for the District Court to make from the facts proved, supported as they were by the best judgment medical experts have upon the subject today, that petitioner was contaminated by the Chinese who came aboard the ship November 11, 1945, at Shanghai. Certainly we cannot say on review that a judgment based upon such evidence is clearly erroneous. Myers v. Reading Co., 331 U. S. 477, 485, 486, 91 L. ed. 1615, 1619, 1620, 67 S. Ct. 1334; Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 88 L. ed. 520, 64 S. Ct. 409, 15 NCCA NS 647. *We think it was an allowable judgment of the District Court*, and

the judgment of the Court of Appeals is Reversed.'"[16] (Emphasis supplied.)

Pertinent to this principle is the basic rule that the amount of a verdict is *purely a question of fact. Dimick v. Schiedt,* 293 U. S. 474, 486, 79 L. Ed. 603, 611 (1935); *St. Louis, I. M. & S. R. R. v. Craft,* 237 U. S. 648, 661, 59 L. Ed. 1160, 1165 (1915).

The Fifth Circuit recently emphasized that the *McAllister* rule draws a distinct line between fact-finder and reviewing tribunal. In *Grigsby v. Coastal Marine Service of Texas, Inc.,* 412 F. 2d 1011 (5th Cir. 1969); reh. den.[17] in an exhaustive opinion on appeal from the findings and judgment of the District Judge, Chief Judge Brown said (1020):

> "The first is that as so often, the briefs on the part of the respondent-appellants 'cannot resist the natural temptation to reargue the facts from a point of view favorable to [each of them], although now adversely determined by the trial Judge.' . . . Counsel, experienced and able as they are, trying valiantly to formulate it in the mold of 'clearly erroneous' 'now incrusted on the hull of maritime jurisprudence,' . . . simply refuse to recognize, even at this late date, 'that in this kind of controversy [the] functions of the courts in the judicial hierarchy are distinct and different' and we would 'undermine the vitality of the system by a too-quick meddling in the principal business of a trial court.

16. This decision emphasizes the general obligation of the reviewing court to draw all inferences favorable to the appellee that can be drawn from the evidence, and that the findings below must be deemed presumptively correct. *Seifert v. Solem,* 387 F. 2d 925, 929 (7th Cir. 1967); *Grigsby v. Coastal Marine Service,* 412 F. 2d 1011, 1020 (5th Cir. 1969).

17. The Chief Justice, then of the District of Columbia Circuit, sat on this panel by designation.

> ** * * A trial of a hotly contested, sharply disputed case is the task of a trial court' and reviewing courts 'even in admiralty * * * should be slow to overturn fact decisions made by the judge before whom the facts are annealed through the hammering, heating process of vigorous, running advocacy.'* . . . Indeed, we must constantly remind ourselves of our distinctive roles. 'If we were to approach it as simply a question—how should this case be decided?—we would effectually bypass a trial court. The problem faced is more nearly that of determining whether the trial judge, faced with the choice—often hard choices between competing versions of simple or complex occurrences—has fairly weighed the matter and has reached a conclusion which seems substantial and reasonable even though another result might have been achieved either by him or others.'" (Emphasis supplied.)

More recently, the same Court expressed the pith of the *McAllister* principle to be:

> "In short—we just don't retry cases here."[18]

The Second Circuit has been similarly adamant upon this issue, even where it expressed specific disagreement with the Trial Judge's findings and award of damages. In *Carroll v. United States,* 133 F. 2d 690, 693-94 (2d Cir. 1943), an appeal in admiralty from an award of damages to a seaman, Judge Learned Hand said that the award was "larger than we should have been disposed to make, had the original decision been ours". But, evidence supporting this award was in the record. "That being so", said Judge Hand, "the judge's choice must stand, whatever our personal doubts. . . ." The same Court made it clear that

18. *Daniels Towing Service, Inc. v. Nat Harrison Assoc.,* 432 F. 2d 103, 105 (5th Cir. 1970).

the effect of a fact-finding by a Trial Judge in admiralty is entitled to no less weight than the verdict of a jury. In *Castro v. Moore-McCormack Lines, Inc.*, 325 F. 2d 72 (2d Cir. 1963), the Court said (74):

> ". . . If the case had been tried to a judge and jury, and the jury had rendered a verdict for defendant on the issue of unseaworthiness, on proper instructions, we would have had no alternative other than to affirm the judgment entered on the verdict. Blier v. United States Lines Company, 2 Cir., 1961, 286 F. 2d 920, cert. denied, 368 U. S. 836, 82 S. Ct. 32, 7 L. Ed. 2d 37. Surely we are not to hold that a jury verdict on such a question is entitled to more weight than the finding of a judge who has demonstrated that he was applying the governing legal standard. See Morales v. City of Galveston, 1962, 370 U. S. 165, 82 S. Ct. 1226, 8 L. Ed. 2d 412 . . . "[19]

This Court has consistently held that, unless there is complete absence of evidence to support the jury's verdict, the appellate Court may not interfere therewith. In *N. Y., C. & H. R. R. v. Fraloff*, 100 U. S. 24, 25 L. Ed. 531, 535 (1879), this Court held that the amount of verdict for damages cannot be disturbed on appeal where there is evidence to sustain it, since this would entail a re-examination of facts. This Court has not changed its position upon this to the present, and this has been specifically held to be the ruling principle in actions under the Federal Employers' Liability Act, 45 U. S. C. A. 51, et seq., which was incorporated into the maritime law by the Jones Act, 46 U. S. C. A. 688. In *Lavender v. Kurn*, 327 U. S. 645, 653,

19. In *Morales*, this Court held that since "the lengthy record shows that these findings were based upon substantial evidence. . . . We cannot say that they were clearly erroneous." (U. S. at 168, L. Ed. at 414-15).

90 L. Ed. 916, 923 (1946), this Court said a measure of speculation is appropriate when facts are in dispute and the appellate court's function is exhausted when the evidentiary basis becomes apparent and it is immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.[20]

In *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 110, 4 L. Ed. 2d 142, 145 (1959), a seaman's Jones Act case, this Court refused to permit the Court of Appeals to reverse the jury's finding of causal connection between trauma and disease, *despite the total absence of medical testimony*, since there was evidence, in the form of testimony by the seaman and circumstantial evidence from which the jury could *infer* causal connection.

The Court below, completely ignoring the *McAllister* principle, conducted a trial *de novo*, to achieve exactly what this Court said shall *not* be done. Every inference and balance of probabilities favoring claimants was reversed as non-existent; every presumption of fact supporting the findings below was passed over. The result was a deprivation to claimants of the most substantial part of the awards made to them.

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20. As this Court there illustrated, the integrity of a verdict under the Federal Employers' Liability Act (and the Jones Act) has been consistently protected, unless there was a complete absence of supporting evidence: *Tiller v. Atlantic C. L. R.*, 318 U. S. 54, 67, 68, 87 L. Ed. 610, 617, 618 (1943); *Tennant v. Peoria & P. U. R. R.*, 321 U. S. 29, 35, 88 L. Ed. 520, 525 (1944); *Rogers v. Missouri Pacific R. R.*, 352 U. S. 500, 1 L. Ed. 2d 515 (1957); *Gallick v. B. & O. R. R.*, 372 U. S. 108, 9 L. Ed. 2d 618 (1963); *Harrison v. Missouri Pac. R. R.*, 372 U. S. 248, 9 L. Ed. 2d 711 (1963); *Dennis v. Denver & Rio Grande W. R. R.*, 375 U. S. 208, 11 L. Ed. 2d 256 (1963). In *Neese v. Southern R. Co.*, 350 U. S. 77, 100 L. Ed. 60, 61 (1955), where the issue was, as here, the contended excessiveness of a damage award, this Court reversed the reversal by the Court of Appeals, per curiam, stating: ". . . as we view the evidence, we thing that the action of the trial court was not without support in the record, and accordingly that its action should not have been disturbed by the Court of Appeals".

For instance, the Court admitted that the awards for pain and suffering "might be sustained on the basis of their individual testimony describing their personal experiences", but paradoxically disregarded this testimony because, *inter alia,* "we regard the awards for pain and suffering . . . excessive" because not supported by the record (A22). The "inclination to . . . discredit" the psychiatric testimony, expressed by the Court as "strong", led to the conclusion that such testimony was "inadmissible" (A14). The Court expressed disbelief of the psychiatrist because his opinions as to each claimant were "curiously similar" (A14), broadly ignoring the obvious record fact that these men had survived *similar experiences* in exactly the *same disaster.*[21]

The effort by the Court below to minimize the events of May 7, 1965 and to remold the facts found below is most rampant in its discussion of the events between collision and rescue, relative to pain and suffering (A21-22). The Court does not deny the existence of testimony which fully sustains the findings below, but proceeds, nevertheless, to re-evaluate and belittle the extent of the physical suffering involved, to the conclusion that, despite the "individual testimony describing their personal experiences . . . the awards for pain and suffering [were] . . . excessive" (A22). The same technique is used to find excessive the awards for subsequent pain and suffering (A24); and loss of life's pleasures (A24-27). In each instance, the Court

21. Although cured by permitting inference of causal connection (*Sentilles v. Inter-Caribbean Shipping Co.,* 361 U. S. 107 (1959)), the Court below committed similar error in holding the testimony of Dr. Krause, the orthopedist, inadmissible, because "nothing in the record discloses the basis for the doctor's opinion as to causation other than the history related to him. . . ." (A19). That statement ignores the testimony by Holley, Idalski, Piechan, Przybyla and Tulgetske describing their experiences in the collision, being hurled into the icy water, and the events before rescue, which confirm the history given to the doctor.

below, in violation of its duty under *McAllister,* just ignored the facts which it admitted do exist in the record, in order to destroy the findings below.

This infringement upon the Trial Judge's jurisdiction, so in conflict with the mandate of this Court, must be reviewed and reversed.

II. In Completely Deleting All of the Psychiatric Testimony Which Was Accepted by the Trial Judge Because It Was Expert Testimony Based Upon History Given by Claimants to the Physician, the Court Below Seriously Erred, in Conflict With the Decisions of the Second Circuit, in Reid v. Quebec Paper Sales & Transp. Co., 340 F. 2d 34; Seventh Circuit, in Spillers v. Tri-State Glass Lined Storage, Inc., 325 F. 2d 322; and the District of Columbia Circuit, in City-Wide Trucking Corp. v. Ford, 306 F. 2d 805, and Kaufman v. Kaufman, 164 F. 2d 519, Which Hold That an Examining Physician May State the History Given to Him as Basis for His Conclusions.

Completely misled by its own aggressive infringement upon the jurisdiction of the District Court, and to support its effort to reach a different factual and money conclusion, the Court completely struck out all of the psychiatric testimony, by holding that the psychiatrist may not rely on the claimant's history and statement in giving his opinion.[22] This completely unsound conclusion directly conflicts not only with common sense and medical necessity and with the reasoning of experts in the field of evidence, but also with the decisions in other circuits which have held that an

22. The Court below cut out this substantial part of the petitioners' medical testimony because, as stated, it did not believe Dr. Dillon in view of the similarity of his diagnoses, and the fact that the Court would have reached a different result based upon the facts (A14).

examining (although not treating) physician may state patient's history and past complaints in order to show the background which the physician considered in reaching his conclusions. Such testimony is not given to prove the truth of the history but to show the basis for the physician's diagnosis. In a case such as this, where the judge is the fact-finder, the appellate court must assume that he considered the testimony for the proper purpose.

In *Reid v. Quebec Paper Sales & Transp. Co.*, 340 F. 2d 34 (2d Cir. 1965), Judge (now Mr. Justice) Marshall, said, at 38:

> "It was also objected that the District Judge erred in accepting the testimony of a Dr. Kaplan, allegedly Reid's examining but not his treating physician, as to Reid's complaints of past headaches. However, the testimony was not introduced to establish the fact that Reid had experienced these headaches, but rather to show the basis of the doctor's diagnosis. Especially since the judge was the trier of fact, we can presume that this testimony was confined to this non-hearsay purpose. . . ."

In *City-Wide Trucking Corp. v. Ford*, 306 F. 2d 805 (D. C. Cir. 1962), Judge Danaher said that "such information furnishes the basis for the opinion or conclusion arrived at in almost every diagnosis,—certainly in cases where the trouble arises from accident, . . ." (809). In *Spillers v. Tri-State Glass Lined Storage, Inc.*, 325 F. 2d 322 (7th Cir. 1963), after fully discussing all views, the Court held that the cases permitting the testifying physician to state the history given to him "embody the better reasoned view" (326). That Court observed that the fact that the history was given to the physician by the plaintiff does *not* affect *competency or admissibility* but goes to its weight, as judged by the fact-finder (327).

The Third Circuit joins the Second, Seventh and District of Columbia Circuits, in opposition to the Sixth, in its Opinion filed several days ago, in Jean A. Fuhrman, Executrix of Estate of Wilbur F. Fuhrman, Deceased v. Reading Co., No. 19,034 (March 11, 1971), a death action under the Federal Employers' Liability Act. The Third Circuit said (Opinion, p. 8):

"Defendant also complains that the medical experts consulted by the plaintiff for purposes of testimony only should not have been permitted to express an opinion based upon a history furnished by the plaintiff. Since the plaintiff himself testified to this very same material during the trial and was available for cross-examination, it is difficult to understand the position of the defense. The plaintiff's history, to which he testified in court was no longer hearsay and the Trial Judge properly ruled that the medical experts could express an opinion based on this factual data."

In *Kaufman v. Kaufman,* 164 F. 2d 519 (D. C. Cir. 1947), the Court specifically recognized that in the case of testimony by an examining psychiatrist, who necessarily must deal solely with the plaintiff's actions, statements and expression of feelings, comprising history and current complaints, these are the sole "objective symptoms" and examination which the psychiatrist can evaluate and describe. Judge Maris said (520):

> ". . . In diagnosing such a subjective condition the physician must necessarily rely largely upon the history and symptoms described to him by the patient. Accordingly it was proper for Dr. Klein to base his diagnosis as to the defendant's impotence upon the history and symptoms which the latter related to him and the trial justice should have permitted him to answer the question propounded to him."

Significantly, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States agrees with these Circuits. The preliminary draft of Proposed Rules of Evidence for the United States District Courts and Magistrates provides:

> "Rule 7-03 Opinion Testimony by Experts
>
> "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."[23]

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23. The Advisory Committee's Note states that this Rule contemplates the testimony by the expert witness based upon data presented to him outside of court and other than by his own perception. The rule, states the Committee, "is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring

Wigmore on Evidence is also in accord, stating that the "witness may on direct examination state the particular circumstances which legitimately affected his knowledge or recollection, even though the fact would otherwise be inadmissible." The author points out that the judge's instructions must be relied upon to prevent improper use of the testimony. Wigmore, Evidence, Vol. II, Sec. 655, p. 760 (3d ed., 1940).[24] McCormick on Evidence is similarly in accord.[25]

The significance of the Court's removal of the psychiatric testimony from the case is seen in the action it then took against the awards. The Court held as "excessive" or fully improper as matter of law, whatever items may have been "influenced" by Dr. Dillon's testimony (ignoring *in toto* the testimony by the individual claimants[26]): 1. The awards to Mulka and Kierzek for pain and suffering were

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23 (cont'd)

the judicial practice into line with the practice of the experts themselves when not in court." Rule 7-05 dispenses completely with the *duty* to state the underlying facts.

24. Referring to *Lee v. Kansas C. S. Ry.*, 206 Fed. 765 (W. D. Ark. 1913), where testimony by a physician as to symptoms stated to him to qualify as a witness was held inadmissible, Wigmore expressed regret "to see a federal court giving in to this modern heresy, which commits the exploded fallacy of totally prohibiting weak evidence instead of merely ensuring the exhibition of its weaknesses". Wigmore, Evidence, Vol. III, Sec. 688, n. 2 (1970).

25. McCormick states that such history is *necessary* in order that the fact-finder may assess his opinion. McCormick, Handbook of the Law of Evidence (1954), Sec. 267.

26. Even if the psychiatric testimony were incompetent, the Commissioners and the District Judge had before them the claimants' testimony as to their suffering and their post-collision orthopedic, physical and emotional problems. As triers of fact, they had the right to "draw the inference" therefrom that the claimants suffered considerably from this emotional trauma, were unable to enjoy life's pleasures, suffered disability and required medical help. *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 109-10, 4 L. Ed. 2d 142, 144-45 (1959). The Court below did comply with this mandate concerning the orthopedic injuries.

vacated completely as based wholly on psychiatric injuries.[27] 2. The Kierzek award for loss of life's pleasures, held based on psychiatric testimony only, was vacated in full.[28] 3. All other awards for pain and suffering and loss of life's pleasures were held grossly excessive, and vacated for re-evaluation.[29] 4. The awards of maintenance and cure to Holley, Idalski, Przybyla and Tulgetske, and all awards for future medical services, were vacated *in toto*.[30] The substantial amounts of the awards thereby affected is obvious.

The conflict between the Sixth Circuit and the Second, Seventh and District of Columbia Circuits, and the support of the latter by two eminent writers on the subject, as well as by the Advisory Committee on Federal Rules of Evidence, require that this Court review the decision below, and express a single Federal rule to be applied uniformly in all admiralty matters throughout the nation. This Court has specifically held that the maritime law must have a *uniform* application throughout the country, unaffected by "local views of common-law rules". This uniformity requirement extends to "the type of proof necessary for judgment". *Garrett v. Moore-McCormack Lines, Inc.*, 317 U. S. 239, 244, 87 L. Ed. 239, 243 (1942).[31] In *Chesapeake & Ohio R. R. v. Kelly*, 241 U. S. 485, 491, 60 L. Ed. 1117, 1123 (1916), this Court said:

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27. A24.

28. A27.

29. A22, 23, 27.

30. A33.

31. Although the instant aspect of the case goes only to measure of damages, it encompasses the entire case, and without the psychiatric evidence the recoveries may be substantially destroyed. Thus, the issue of admissibility of this medical testimony is so important, that it does "significantly affect" the result of the case, and thus, requires the application of a uniform maritime principle of law. *Guaranty Trust Co. of N. Y. v. York*, 326 U. S. 99, 109, 89 L. Ed. 2079, 2086 (1945).

"But the question of the proper measure of damages is inseparably connected with the right of action, and in cases arising under the Federal employers' liability act it must be settled according to general principles of law as administered in the Federal courts."

III. Future Loss of Earning Capacity Is Not Measured by Comparing Actual Earnings Before the Accident With Earnings Afterward, But by Considering Loss of Earning Power Into the Future and All Relevant Facts Which Affect the Whole Economic Horizon of the Claimant Must Be Considered. In Announcing a Rule for the Sixth Circuit Limiting the Measure of Such Future Loss to a Comparison of the Actual Earnings Before and After the Accident, the Court Below Was in Direct Conflict With the Decisions in the Second Circuit in Alexandervich v. Gallagher Bros. Sand & Gravel Corp., 298 F. 2d 918 (1961) and Sylvestri v. Warner & Swasey Co., 398 F. 2d 598 (1968); the Third Circuit in Wiles v. N. Y., C. & St. L. R. R., 238 F. 2d 328 (1960), Thompson v. Trent Maritime Co., 353 F. 2d 632 (1965) and Johns v. B. & O. R. R., 239 F. 2d 385 (1957); the Fourth Circuit in Lawrence v. Norfolk Dredging Co., 319 F. 2d 805 (1963), and Carter v. United States, 49 F. 2d 221 (1931); and the Eighth Circuit in United States v. Phillips, 44 F. 2d 689 (1930), Which Apply All Relevant Factors to Such Evaluation.

Progressing in its disagreement with the fact-findings and evaluations of the Trial Judge, the Court below summarily disallowed all awards for loss of earning capacity to the date of judgment, and vacated and remanded for re-evaluation the awards for future loss of earnings to all surviving seamen and to the families of the decedents (A27-31, 34, 40-41). Despite a record showing not only past earnings

but, also, an analysis of subsequent collective bargaining agreements showing increases in wage rates, overtime rates, vacation pay, bonuses, and pension and welfare benefits,[32] and testimony as to the rate of increase in wages (R. 21-22), the Court below said that the record was "utterly void of evidence [to] justify an award" (A28). The sole basis for this was that each claimant was paid "on a higher basis" between sinking and judgment than he had received immediately before or for the average of the four years immediately before the sinking.

The Court announced the rule in the Sixth Circuit to be: the base used to measure earnings loss after injury is "the higher of the year immediately preceding the incident or the average of the four years preceding it" (A29). No effect, said the Court, is to be given to any other factor, even if the record be replete with same, as in the instant case. This rule is completely erroneous, since it measures loss of earnings only, not loss of earning *capacity,* and is in specific conflict with the rule applied in other Circuits.

The rule used elsewhere holds that the proper measure is the claimant's earning *capacity;* that the fact-finder may *not* limit his sights to the immediate present, but must consider *the whole economic horizon* of the claimant. This involves not merely a comparison of the amount of dollars in his pay envelope now with what he had before the accident. In *Wiles v. N. Y., C. & St. L. R. R.,* 283 F. 2d 328, 332 (3d

32. These Analysis of Agreements are based upon agreements between United States Steel Corporation and: District 50, United Mine Workers (Kierzak—Deft. Ex. 11, Quaine, R. 51, 55); Associated Maritime Officers, Division of District 2, Marine Engineers Beneficial Association (Kierzek—Deft. Ex. 9, Quaine, R. 51, 54); District 2, Marine Engineers Beneficial Association (Kierzek—Deft. Ex. 12, Quaine, R. 51, 55); United Steelworkers of America—Pension Agreement (Kierzek—Claimants Ex. 7; Gallagher, R. 25); Schedule of Costs to Obtain Pension & Welfare Benefits (Kierzek—Claimants Ex. 8; Idalski, 8/22/68, R. 61); Program of Insurance Benefits (Kierzek—Deft. Ex. 24, Quaine, R. 64).

Cir. 1960), an FELA case, the injured plaintiff received a larger salary after the accident than before. The jury returned a verdict including damages for future loss of earning power. The District Judge set aside the award for future loss as "too speculative".[33] The Third Circuit reversed, holding (332):

> ". . . The evidence that Wiles is employed by the Railroad at a larger salary than that which he was receiving when he was injured is a facet of the issue of damages which the jury was entitled to take into consideration as was the testimony that Wiles, with his present medical history, would have difficulty under the conditions of modern industry in obtaining gainful employment in heavy work except with his present employer. Wiles is presently employed by the Railroad but this will not prevent him from being discharged or from being laid off. Because of his present employment Wiles has not yet suffered economic loss but if he cannot obtain gainful employment elsewhere he is chained to his present job in a kind of economic servitude. We cannot think that it was the intention of Congress in enacting the Federal Employers' Liability Act to effect such a result. *Certainly, Wiles' economic horizons have been limited by his injury* . . . All of the factors enumerated and others were before the jury and we cannot say that there was a significantly larger element of speculation in arriving at an estimate of Wiles' loss of future earnings than there would be in any ordinary instance requiring an estimate of damages by a jury.

33. The District Judge, said, as the Court below did here, that "There is a complete absence of evidentiary facts on which the jury could intelligently assess the monetary difference between what plaintiff would have been able to earn in the future had he not been injured and what he will be able to earn in his physical condition during his work-life expectancy." (332)

> Since none of us is capable of foreseeing the future with any substantial degree of certainty every estimate of damages must contain elements of speculation." (Emphasis supplied.)

In *Thompson v. Trent Maritime Co.*, 353 F. 2d 632 (3d Cir. 1965), the Court said, at 635:

> "Even though he earned more as a longshoreman in 1953, the year in which his right foot was injured, than in previous years, it does not follow that he did not sustain a loss of wages in that year if the evidence showed that he could have earned a larger amount had he not been injured. See, for example, Wiles v. N. Y., C. & St. L. R. Co., 283 F. 2d 328, 332 (C. A. 3, 1960), cert. denied, 364 U. S. 900, 81 S. Ct. 232, 5 L. Ed. 2d 193; Taylor v. Monongahela Ry. Co., 155 F. Supp. 601 (W. D. Pa.), aff'd per curiam 256 F. 2d 751 (C. A. 3, 1958)."

Similarly, in *Johns v. Bal. & Ohio R. R.*, 239 F. 2d 385 (3d Cir. 1957),[34] the defendant contended that the plaintiffs were limited to the decedent's earning record shown at time of death, rather than his "potential earning capacity". However, the Trial Judge held that evidence as to probable increased earnings was properly considered by the jury. The Third Circuit Court of Appeals affirmed, per curiam.

The Court of Appeals for the Second Circuit held, in *Alexandervich v. Gallagher Bros. Sand & Gravel Corp.*, 298 F. 2d 918 (1961), after reviewing the injured seaman's expected wage rate, overtime, and fringe benefits, at 921:

> "When the likelihood of substantial overtime pay is considered, and it is noted that as of February 1, 1962, Alexandervich would have been entitled to an

34. Affirming, per curiam, the District Court, 143 F. Supp. 15, 27-28 (W. D. Pa. 1956).

additional $300.00 in wages, and that, *in the light of the history of recurrent wage increases, he would very likely receive additional increases in the following eleven years,* it is apparent that a finding that he would have averaged $10,000.00 per year in the remaining period of his work expectancy is supported by substantial evidence, and is not excessive. In any event, we should not merely substitute our judgment for that of the trial judge." (Emphasis supplied.)

In *Sylvestri v. Warner & Swasey Co.,* 398 F. 2d 598 (2d Cir. 1968), the Court approved placing in evidence the union pay scale in order to evaluate the plaintiff's future loss of earnings. Chief Judge Lumbard said, at 607:

". . . Since it was shown that Sylvestri was trained as, and acting in the capacity of, such an operator at the time of his accident but could no longer perform this type of work, the pay scale is a direct indicator of Sylvestri's potential loss of future earnings *even though he continued to receive a fixed salary* from his own company." (Emphasis supplied.)

The Fourth Circuit Court said, in *Lawrence v. Norfolk Dredging Co.,* 319 F. 2d 805 (1963), a Jones Act case, at 809:

"The fact that Lawrence has earned as much or more since his return to work at the same job following the accident as he had earned prior to the accident is strenuously urged as a circumstance to support the contention that the verdict was excessive. However, a comparison of earnings before and after the injuries is not a particularly significant or controlling consideration where there was evidence before the jury to support the conclusion that, under circumstances such as these, the injuries will adversely affect plain-

tiff's future employment possibilities. See Wiles v. New York, Chicago & St. Louis Railroad Co., 283 F. 2d 328 (3d Cir. 1960), cert. denied, 364 U. S. 900, 81 S. Ct. 232, 5 L. Ed. 2d 193; Faudree v. Iron City Sand & Gravel Co., 201 F. Supp. 447 (W. D. Pa. 1962), aff'd, 315 F. 2d 647 (3d Cir. 1963). . . ."

In *Carter v. United States*, 49 F. 2d 221 (4th Cir. 1931), the same Court held that:

> "The mere fact that a claimant may have worked for substantial periods during the time when he claims to have been permanently and totally disabled is not conclusive against him. The question is not whether he worked, but whether he was able to work, i.e., whether he was able to follow continuously some substantially gainful occupation without material injury to his health. Of course, the fact that a man does work is evidence to be considered by the jury as tending to negative the claim of disability; but the fact that he works when physically unable to do so ought not defeat his right to recover if the jury finds that such disability in fact existed. . . ." (223)

In *United States v. Phillips*, 44 F. 2d 689 (8th Cir. 1930), defendant contended that since the claimant did work, he was not disabled, as matter of law. The Eighth Circuit Court strongly disagreed, stating:

> ". . . Some persons, who are totally incapacitated for work, by virtue of strong will power may continue to work until they drop dead from exhaustion, while others with lesser will power will sit still and do nothing. Some who have placed upon them the burdens of caring for aged parents or indigent relatives, feeling

deeply their responsibility and actuated by affection for those whom they desire to assist, will keep on working when they are totally unfit to do so. . . ." (691)

The Second, Third, Fourth and Eighth Circuits hold, contrary to the Sixth, that earning capacity means earning *power,* not mere earnings; and that *all* factors relevant to the claimant's economic future must be considered. These courts properly recognize that "standing alone, . . . parity of wages is inconclusive"; that the real fact question is whether "the economic horizon of the disabled person has been shortened because of the injuries", bearing in mind that "the normal status of a healthy person is to progress, and to the extent that his progress has been curtailed, he has suffered a loss which is properly computable in damages."[35] If "choice of Circuit" is not to control the seaman's measure of damages, in this aspect as well as others, this Court must delineate a Federal rule to complement and give measure to the seaman's right of action under the general maritime law as amended by the Jones Act. Only in this manner can the maritime law "have a uniform application throughout the country". *Garrett v. Moore-McCormack Co.,* 317 U. S. 239, 244, 87 L. Ed. 239, 243 (1942).

IV. The Reversal by the Court Below of the Awards to the Widows for Loss of Consortium, Care and Guidance Was Based Upon a Misconception of the Decision of This Court in Michigan Central R. R. v. Vreeland, 227 U. S. 59 (1913), Which Specifically Recognized that Pecuniary Loss Includes Such Damages.

The Court below vacated in full the awards to widows for loss of consortium (A46). This was based upon a mis-

35. The essence of the principle was thus expressed by Chief Judge Leahy in *Yates v. Dann,* 124 F. Supp. 125, 133 (D. Del. 1954).

conception of this Court's reasoning in *Michigan Central R. R. v. Vreeland*, 227 U. S. 59, 57 L. Ed. 417 (1913). There, this Court considered the measure of damages for death under the Federal Employers' Liability Act of April 22, 1908, 45 U. S. C. A. 51, et seq. (made applicable to seamen by the Merchant Marine (Jones) Act of 1920, 46 U. S. C. A. 688). Mr. Justice Lurton stated that the death provision provides "a liability for the pecuniary damage resulting" (U. S. at 68, L. Ed. at 421), and that such loss "is not dependent upon any legal liability of the injured person to the beneficiary" (U. S. at 70, L. Ed. at 422); and that "a pecuniary loss or damage must be one which can be measured by some standard" (U. S. at 71, L. Ed. at 422). The opinion continues:

> *"Nevertheless, the word as judicially adopted is not so narrow as to exclude damages for the loss of services of the husband, wife, or child, and, when the beneficiary is a child, for the loss of that care, counsel, training, and education which it might, under the evidence, have reasonably received from the parent, and which can only be supplied by the service of another for compensation."* (U. S. at 71, L. Ed. at 422)
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> * * *
>
> "Neither 'care' nor 'advice,' as used by the court below, can be regarded as synonomous with 'support' and 'maintenance,' for the court said it was a deprivation to be measured over and above support and maintenance. It is not beyond the bounds of supposition that by the death of the intestate his widow may have been deprived of some actual customary service from him, capable of measurement by some pecuniary standard, and that in some degree that service might include as elements 'care and advice.' " (U. S. at 74, L. Ed. at 423.) (Emphasis supplied.)

In that case, "There was neither allegation nor evidence of such loss of service, care, or advice." (U. S. at 74, L. Ed. at 423). Therefore, the fact-finders had been left "to conjecture and speculation", with no evidentiary basis upon which to decide just what types of loss were involved. In that circumstance, this Court held that there was to be no recovery as to these items (U. S. at 74, L. Ed. at 423).[36]

However, in the instant case, the widows and surviving children testified at length and in detail concerning the decedents' contribution of care, services, counsel, training and consortium (in addition to money support) to each household. It is in view of such facts as these that Mr. Justice Lurton warned, in *Vreeland,* that "no hard and fast rule by which pecuniary damages may in all cases be measured is possible" (U. S. at 72, L. Ed. at 422); and that "the rule for the measurement of damages must differ according to the relation between the parties plaintiff and the decedent" (U. S. at 72, L. Ed. at 422); and that "each fresh state of facts" must be dealt with as it arises (U. S. at 72, L. Ed. at 422).[37]

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36. But, in *Norfolk & Western Ry. v. Holbrook,* 235 U. S. 625, 629, 59 L. Ed. 392, 393 (1915), an FELA death case, there *was* "testimony concerning the personal qualities of the deceased and the interest which he took in his family." Therefore, this Court, citing *Vreeland,* said that it was proper, then, to take into consideration "the care, attention, instruction, training, advice, and guidance which the evidence showed he reasonably might have been expected to give his children during their minority, and to include the pecuniary value thereof in the damages assessed". Mr. Justice McReynolds emphasized that "The ascertained circumstances must govern in every case." (U. S. at 629, L. Ed. at 393).

37. See, e.g., *Thomas v. Conemaugh Black Lick R. R.,* 133 F. Supp. 533, 547 (W. D. Pa. 1955); aff'd., 234 F. 2d 429 (3d Cir. 1956) where the testimony showed, as in the instant case, "that the decedent performed other compensatory services in and about the home, such as painting and repairing the premises, plumbing, gardening and many other types of services, which represented over the potential life span of decedent a substantial pecuniary loss."

This case now presents this fresh state of facts. *Here, the losses of service, care, consortium and advice have been alleged and fully delineated,* and the items of which the beneficiaries have been deprived have been described by them in the record.[38]

The Court below urges the proposition that, under *Vreeland,* the claimant is obligated to give specific evidence of the replacement of the services and the dollar value thereof; that the decedents' families must show that these "services" were actually replaced or purchased on the open market by the surviving families, because this Court used the expression "and their replacement value estimated" (A46). But, this would mean that a widow who did not hire someone to give her love and advice, or a child who did not hire a tutor did not suffer the loss. When this Court said that the fact-finder must "estimate the financial value of such care and advice from their own experiences as men", it meant that the fact-finder, or jury, was to place a dollar value on these items themselves, and *not* to seek such dollar values from the mouths of witnesses. This Court left this to the fact-finder to consider, just as it must evaluate pain and suffering. The Sixth Circuit's interpretation completely destroys this Court's reasoning and intent in *Michigan Central v. Vreeland,* and must be reviewed and reversed.

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38. The Fuhrman family unit and relationships: R. 494-501; the Jones family: R. 586-593; the Haske family: R. 19-20, 537-42. The statement by the Court below that "here, there was no evidence of the nature of the care, guidance or counsel which the decedents gave to their wives" (A46) is clearly denied by the record.

V. In Evaluating Future Damages, the Present Value Doctrine as Expressed by This Court In C. & O. Ry. v. Kelly, 241 U. S. 485 (1916) Requires That Consideration Be Given to the Purchasing Power as Well as to to the Earning Power of Money; Therefore, the Court Below Erred and Was in Conflict With the Ruling of This Court in Ordering That the Awards for Future Losses Made Herein Be Reduced to Present Value, While Failing to Give Effect to Evidence Demonstrating an Inflationary Trend.

The Trial Court, giving effect to the decreasing trend in the purchasing power of the dollar, found that such inflation offset any discount of future damages to present value.[39] The Court of Appeals held this error, and ordered that no effect be given to the declining dollar value, and that the awards be discounted (A50). This was clear error, in conflict with the reasoning of this Court in the leading case of *Chesapeake & Ohio R. R. v. Kelly,* 241 U. S. 485, 491, 60 L. Ed. 1117, 1122 (1916). There, this Court based its announcement of the discounting requirement upon the need "that adequate allowance be made, according to circumstances, for the earning power of money". The essence of this reasoning was that "when future payments or other pecuniary benefits are to be anticipated, the verdict should be made up on the basis of their present value only" (U. S. at 491, L. Ed. at 1122), since the claimants are expected to put this money to work to earn more money, thus making up the discount. The same basis requires similar consideration for inflation, if such is shown; the former concerns the

39. The District Court determined that a 4 per cent discount would reduce future damages to present value. The "Economic Report of the President to Congress", January 1969, pp. 58-59 (115 Cong. Rec. H351 (H. Doc. No. 91-28)), stated that there would be a 4 per cent increase in the loss of dollar purchasing value. Therefore, the fact-finder determined that the discount and dollar-value loss offset each other (R. 88).

earning power of money, and the latter, its *purchasing* power. Otherwise, the "compensatory" aspect of damages would be mere illusion.

Judge Holtzoff, bearing in mind this Court's monition against forgetting the liberal purpose of death statutes and the misfortune of narrow construction,[40] held that "in determining what constitutes a reasonable amount of damages the shrinking purchasing power of the dollar must be borne in mind." *Hord v. National Homeopathic Hospital,* 102 F. Supp. 792, 793-94, 796 (D. C. 1952), aff'd. 204 F. 2d 397 (D. C. Cir. 1953).[41]

The Court below cited as precedent its prior decision in *Sleeman v. C. & O. Ry.,* 414 F. 2d 305, 307 (6th Cir. 1969) (A50), wherein it denied consideration of the inflationary trend offset, because there was "no evidentiary basis" for it in the record. But, here, the District Court had such basis in the President's Economic Report.[42] The action below, wholly misapplying this Court's holding concerning measure of damages under the maritime law, must be reviewed and reversed.

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40. *Van Beeck v. Sabine Towing Co.,* 300 U. S. 342, 350-51, 81 L. Ed. 685 (1937).

41. Similarly, *Foster v. Donora So. RR,* 144 F. Supp. 297, 298 (W. D. Pa. 1956).

42. See e.g., *Pierce v. N. Y. C. R. Co.,* 304 F. Supp. 44, 45-6 (W. D. Mich., S. D. 1969), where the District Judge took judicial notice of Department of Labor statistics on inflationary trends and thereby offset reduction to present worth.

VI. Admiralty Courts Will Allow Interest From the Date of the Loss in Order to "Make Whole" the Plaintiff. Reversal by the Court Below of Such Award Was In Conflict With the Decisions of the Second Circuit, in Petition of City of N. Y., 332 F. 2d 1006 (1964) and Moore-McCormack Lines, Inc. v. Richardson, 295 F. 2d 583 (1961), Which Apply to Personal Injury and Death Cases the Admiralty Doctrine of Restitutio in Integrum.

The Trial Court awarded pre-judgment interest in the death cases, citing the Second Circuit in *Moore-McCormack Lines, Inc. v. Richardson ("The Mormackite")*, 295 F. 2d 583 (1961).[43] The trial judge here recognized that it thus conflicted with the Sixth Circuit's opinion in *Cleveland Tankers v. Tierney*, 169 F. 2d 522 (1948), but observed that:

> "In the twenty-one years elapsing since the *Cleveland Tankers* decision, however, a generation of men and several generations of law have passed. The benefits of current legal thought and contemporary judicial decisions are before us. They reflect acceptance of prejudgment interest as a legitimate element of damages. We believe this element of damages is valid and respectfully urge the Sixth Circuit Court of Appeals to consider anew the issue in light of contemporary decisions, economic facts and the legal certainty that a debt due on the date of death is payable on the date of death; and a debt due but not paid, bears interest.
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> "Moreover, the discipline of a prejudgment interest payment will pressure, legitimately, the parties involved to proceed with dispatch to final judgment. . . ." (R. 79-80).

43. Confirmed, *Petition of City of New York*, 332 F. 2d 1006 (2d Cir. 1964).

The Court of Appeals, however, merely reversed this award because it conflicted with its 1948 conclusion (A50). This reversal was solely because of the *Cleveland Tankers result,* ignoring the fact that its expressed reason had been the then, 1948, "general practice in admiralty." The current practice, under better reasoning, is to follow the long-established admiralty policy concerning property damage, making no difference between loss of life or limb and loss of property. As Chief Judge Lumbard said, in *Petition of City of New York,* 332 F. 2d 1006 (2d Cir. 1964), at 1007-08:

> ". . . It has long been held proper for admiralty courts fully to restore the injured party to his condition at the time of injury by allowing and fixing prejudgment interests from the date of the loss in proceedings involving property damage. [citing cases] . . . Traditionally, at common law prejudgment interest on an unliquidated tort claim is not allowed. [citing cases] . . . More recently, it has been determined that those who obtain awards resulting from deaths of crew members who died in maritime accident are entitled to prejudgment interest. [citing cases] . . . We said in the Moore-McCormack case that 'when a court fixes damages to compensate for a loss which occurred in the past, there should be some allowance for the period between the date of the loss and the date of judgment. Recompense may thus be given for the further loss in the postponement of the receipt of compensation. . . .'
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> "*The defendant's liability arises at the time of the injury* to the plaintiff and the later award by the court merely fixes the amount of a loss suffered at a *prior* time.
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> • • •

> "The broad application of *restitutio in integrum* enables a more equitable measure of the loss to the injured party—particularly in light of the progressively long delays in disposing of much of the litigation which must wait its turn on crowded court calendars. Moreover, the award of prejudgment interest discourages sham contentions and an improper use of the law's delays and thereby assists an earlier settlement between the parties." (Emphasis supplied.)[44]

The conflict between the Sixth Circuit and the other Circuits requires that certiorari be granted and the decision below reversed.

CONCLUSION.

The Court below, dissatisfied with the amount of damages found by the Trial Court, has conducted a trial *de novo*, with reconsideration of credibility, reweighing of testimony, and refinding of facts, in complete disregard of *McAllister v. United States*. In this process, the Court below barred evidence and disallowed items of damage, declaring doctrine directly in conflict with the decisions of this Court and other circuits and with admiralty principles. Further, although the Court of Appeals reversed the Trial Judge's decisions as to the rule of admissibility of expert

44. In addition to cases cited hereinabove: *The Natchez*, 78 Fed. 183 (5th Cir. 1896) (Property damage); *The President Madison*, 91 F. 2d 835, 845-47 (9th Cir. 1937) (Property damage); *Geotechnical Corp. v. Pure Oil Co.*, 214 F. 2d 476, 477-78 (5th Cir. 1954) (Property damage); *Moore-McCormack Lines, Inc. v. Amirault*, 202 F. 2d 893, 898 (1st Cir. 1953) (Discusses Admiralty court's discretion to award prejudgment interest, generally); *National Airlines, Inc. v. Stiles*, 268 F. 2d 400, 405 (5th Cir. 1959) (Death on High Seas Act); *Petition of Midwest Towing Co.*, 203 F. Supp. 727, 733 (E. D. Ill. 1962), aff'd., 317 F. 2d 270 (7th Cir. 1963) (Jones Act, death); *Gardner v. National Bulk Carriers, Inc.*, 221 F. Supp. 243, 247-48 (E. D. Va. 1963) (Jones Act, death).

testimony and measure of damages, it remanded for further findings limited to the original record, less the excluded testimony, without permitting claimants to present further evidence pertinent to a determination under the Court of Appeals' views of the law, if said be held correct. This was directly contrary to the principle announced by this Court in *Byrd v. Blue Ridge Rural Electric Company Cooperative, Inc.*, 356 U. S. 525, 2 L. Ed. 2d 953, reh. den., 357 U. S. 933, 2 L. Ed. 2d 1375 (1958). To settle these conflicts and to protect the uniform application of maritime law, this Court should review and reverse the judgment below.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
MARTIN J. VIGDERMAN,
J. HAROLD TRAVERSE,
FREEDMAN, BOROWSKY AND LORRY,
Counsel for Petitioners.

APPENDIX A.

Merchant Marine (Jones) Act, 46 USCA 688.

§ 688. Recovery for Injury to or Death of Seaman.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located (41 Stat. 1007).

Federal Employers' Liability Act, 45 USCA 51.

§ 51. Liability of Common Carriers by Railroad, in Interstate or Foriegn Commerce, for Injuries to Employees From Negligence; Definition of Employees.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or,

in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. * * * * Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

Federal Rules of Civil Procedure.

RULE 52.

FINDINGS BY THE COURT.

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

APPENDIX B.

Court's Rulings on Objections and Requests for Modifications to Commissioners' Awards and Opinions Filed May 7, 1969, and Court's Final Orders, Awards, Decrees and Judgments.

(Filed July 8, 1969.)

CONNELL, *J.*

The Court has reviewed in detail the following documents prior to the determination of all the objections filed and modifications requested concerning the Commissioners' Awards and Opinions submitted May 7, 1969.

1. Commissioners' Awards and Opinions, May 7, 1969 (Schroeder/Grogan)

2. Petitioners' objections to Commissioners' Report incorporating petitioners' answer briefs filed with the Commissioners prior to the awards of May 7, 1969 (Keenen/Keig) (filed May 20, 1969)

3. Objections to Commissioners' Report, Awards and Opinions on behalf of Barbara J. Fuhrman, Administratrix; Marion Jones, Administratrix; Elizabeth Haske, Administratrix; Billy R. Holley, Michael Idalski, Jerome Kierzek, Raphael Przybyla, Walter Tulgetske, Ronald G. Piechan and Stanley P. Mulka (Freedman/Traverse) (filed May 29, 1969)

4. Brief in Support of Objections on Behalf of Barbara J. Fuhrman, Administratrix; Marion Jones, Administratrix; Elizabeth Haske, Administratrix; Billy R. Holley, Michael Idalski, Jerome Kierzek, Raphael Przybyla, Walter Tulgetske, Ronald G. Pie-

chan and Stanley P. Mulka (Freedman/Traverse) (filed May 16, 1969)

5. Brief in Opposition to Petitioners' Objections to Commissioners' Report in Behalf of Barbara J. Fuhrman, Administratrix, Marion Jones, Administratrix, Elizabeth Haske, Administratrix, Billy R. Holley, Michael Idalski, Jerome Kierzek, Raphael Przybyla, Walter Tulgetske, Ronald G. Piechan and Stanley P. Mulka (Freedman/Traverse) (filed May 29, 1969)

6. Petitioners' Response to Objections to Commissioners' Awards Filed on Behalf of Claimants Fuhrman, Haske, Jones, Holley, Idalski, Kierzek, Mulka, Piechan and Przybyla (Keenen/Keig) (note that Tulgetske omitted) (filed May 28, 1969)

7. Brief in Opposition to Objections of Petitioners to Commissioners' Report incorporating the Lamp brief filed with the Commissioner prior to the award of May 7, 1969 (Hanson/Mann) (filed June 5, 1969)

8. Motion to Modify Commissioners' Award in Claim of Alice Marie Lamp (Hanson/Mann) (filed June 5, 1969)

9. Pettioners' brief in Opposition to Claimant's Motion to Modify Commissioners' Award in claim of Alice Marie Lamp (Keenen/Keig).

COURT'S RULINGS.

The Court overrules all objections by all parties to the Commissioners' Awards and Opinions filed May 7, 1969. The Court further denies all modifications in the awards requested by any one or all of the parties. The Court on May 7, 1969, received and accepted the Commissioners' Awards and Opinions. The Court now this 8th

day of July, 1969, promulgates the Commissioners' Awards and Opinions as the Court's Awards and Opinions and enters, as the final orders, decrees, awards, and judgments for all parties, the awards and opinions of the Commissioners dated May 7, 1969. The facts found and the laws applied by the Commissioners in their awards and opinions are accepted as the findings of fact and rules of law of this Court.

COURT'S OPINION.

All documents presented by the parties reveal the highly controversial factual materials presented in these claims. The Court after careful consideration believes that the findings of all facts by the Commissioners, such as the loss of earning capacity, fringe benefits, personal expenses and decedent's share of household expenses, life expectancy and work-life expectancy, pain and suffering, losses based on familial relationships, physical and mental disabilities, maintenance and cure, interest and discount percentages, economic productivity and purchasing power values and all other facts, are reasonable findings of fact by the Commissioners which this Court accepts and promulgates as its findings of facts.

The Court further recognizes these controversial rules of law involved in these claims:

1. No Deduction of Income or other Taxes.

2. Exclusion of Life Insurance and Social Security benefits from any consideration.

3. Granting of pre-judgment interest and *denial of post-judgment interest.*

4. Exclusion of the fact of remarriage by decedent's widow from any consideration.

5. Admission of certain letters, medical and insurance documents.

6. Admission of psychiatric evidence utilizing the words of claimants spoken to the psychiatrist retained as an expert witness.

The Court accepts and promulgates as its rules of law, not only the enumerated issues above but all controverted issues of law, and the Commissioners' determinations on each rule of law in controversy in each of these claims.

JAMES C. CONNELL,
United States District Judge.

Dated July 8, 1969.

APPENDIX C.

Judgment on Decision by the Court.

(Entered July 8, 1969.)

This action came on for trial before the Court, Honorable James C. Connell, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the claimants recover from the above petitioners the following judgments:

Alice Marie Lamp, Administratrix of the Estate of Frank Donald Lamp, deceased, the sum of $452,084.00;

Jean Cook, Administratrix of the Estate of Charles H. Cook, deceased, the sum of $194,491.00;

Barbara Fuhrman, Administratrix of the Estate of Arthur Fuhrman, deceased, the sum of $338,095.00;

Elizabeth Haske, Administratrix of the Estate of Stanley Haske, deceased, the sum of $308,702.00;

Marion B. Jones, Administratrix of the Estate of Eugene F. Jones, deceased, the sum of $149,414.00;

Jerome F. Kierzek, the sum of $88,860.00;

Stanley P. Mulka, the sum of $92,740.00;

Raphael Przybyla, the sum of $196,288.00;

Ronald G. Piechan, the sum of $82,160.00;

Billy R. Holley, the sum of $251,976.00;

Michael John Idalski, the sum of $89,420.00;

Walter Tulgetske, the sum of $195,888.00.

It Is Further Ordered that the costs of the case be assessed against the Petitioners.

Dated at Cleveland, Ohio, this 8th day of July, 1969.

James A. Green,
Clerk of Court.

APPENDIX D.

Opinion.

Nos. 19835-36-37-38-39.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

IN THE MATTER OF: THE PETITION OF UNITED STATES STEEL CORPORATION AND PETITION OF DEN NORSKE AMERIKALINJE A/S OWNER OF THE M/S TOPDALSFJORD, FOR EXONERATION FROM OR LIMITATION OF LIABILITY.

UNITED STATES STEEL CORPORATION AND DEN NORSKE AMERIKALINJE A/S,

Appellants,

v.

ALICE MARIE LAMP, ADMINISTRATRIX OF THE ESTATE OF DONALD LAMP, DECEASED, ET AL.

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Decided and Filed December 23, 1970.

Before: PHILLIPS, *Chief Judge,* and WEICK and PECK, *Circuit Judges.*

PECK, *Circuit Judge*

There are herein considered appeals perfected by two shipowners from judgments entered against them in favor

of twelve injured parties or personal representatives of decedents and cross appeals by the latter groups protesting the alleged inadequacy of those judgments. Appellants will sometimes herein be referred to jointly as "Shipowners" and separately as "United States Steel" and "Den Norske", respectively, and the injured parties and personal representatives of decedents as "Claimants." Claimants are seven seamen and five widows and administratrices of the estates of seamen who were allegedly injured or who lost their lives when the bulk carrier steamship *Cedarville* sunk in the Straits of Mackinac May 7, 1965. All such decedents and surviving claimants were members of the crew of that vessel.

The sinking of the *Cedarville,* owned by United States Steel, followed its collision with the Norwegian ship *Topdalsfjord,* owned by Den Norske. The collision occurred in a dense fog, and ten members of the *Cedarville* crew were lost and twenty more sustained injuries which resulted in the filing of claims. Five of the death claims and thirteen of the personal injury claims were settled during earlier stages of these proceedings, and we are here concerned with the remaining five claims of the next of kin of the decedents and of seven personal injury claimants. Petitions for exoneration from or limitation of liability were filed in the District Court[1] immediately following the disaster, followed by the filing of claims by the various claimants. Reference is made to the opinion of the District Court (276 F. Supp. 163) for a detailed statement of the facts[2], which will be restated herein only to the extent required for present purposes. Punitive damages were awarded by the District

1. Den Norske's petition was filed in the District Court for the Northern District of Illinois, Eastern Division, but was subsequently transferred to the Northern District of Ohio, Eastern Division, wherein the United States Steel Petition was originally filed.

2. We are aware of Shipowners' dissatisfaction with that statement, and we do not by this reference adopt it.

Court against United States Steel, which perfected an appeal from such award to this Court. We determined the award of punitive damages to have been error in a decision specifically providing that that determination would have no effect upon the awarding of compensatory damages to the various claimants. *United States Steel Corporation v. Barbara J. Fuhrman, Administratrix,* 407 F. 2d 1143 (1969), *cert. denied,* 398 U. S. 958 (1970).

During the pendency of the punitive damages proceedings and appeal, a stipulation was entered into by counsel for all parties and approved by the Court. Under this stipulation the shipowners' petitions for exoneration and limitation of liability were denied and their claims dismissed with prejudice, and it was further provided that, subject to the right of review and appeal, the disposition of all claims for damages, excluding punitive damages, be determined by a commissioner to be appointed by the District Court. It was further stipulated that hearings concerning compensatory damages should proceed during the pendency of the punitive damage determination, which were to be submitted on stipulated portions of the record. As has been hereinabove indicated, the punitive damage issue has heretofore proceeded to finality.

Pursuant to this stipulation, the District Court appointed two Commissioners to receive the evidence with reference to all of the claims, and they in due course filed their Awards and Opinions for the various claimants. The District Court thereafter received and overruled objections and requests for modifications and accepted the facts found and law applied by the Commissioners in their awards and opinions "as the findings of fact and rules of law of this Court." By separate document of even date judgments in favor of the individual claimants for specified sums were entered and costs were assessed against the Shipowners. The amounts of the judgments are as follows:

Alice Marie Lamp, Administratrix of the Estate of Frank Donald Lamp, deceased	$452,084.00
Jean Cook, Administratrix of the Estate of Charles H. Cook, deceased	194,491.00
Barbara Fuhrman, Administratrix of the Estate of Arthur Fuhrman, deceased	338,095.00
Elizabeth Haske, Administratrix of the Estate of Stanley Haske, deceased	308,702.00
Marion B. Jones, Administratrix of the Estate of Eugene F. Jones, deceased	149,414.00
Jerome F. Kierzek	88,860.00
Stanley P. Mulka	92,740.00
Raphael Przybyla	196,288.00
Ronald G. Piechan	82,160.00
Billy R. Holley	251,976.00
Michael John Idalski	89,420.00
Walter Tulgetske	195,888.00

Before passing to a consideration of the separate items of damages itemized by the Commissioners in their determination of the claimants' awards, attention is directed to the issue presented concerning the scope of the present review. This issue was before us in the appeal dealing with the question of the allowance of punitive damages in the present case and we therein determined that "Rule 52(a) applied to the findings of fact of the District Judge . . . notwithstanding that he heard no live testimony at the trial. *Commissioner v. Duberstein,* 363 U. S. 278, 291; *United States v. United States Gypsum Co.,* 333 U. S. 364, 395." *United States Steel Corp. v. Fuhrman, Administratrix, supra;* see also *Commissioner of Internal Revenue v. Spermacet Whaling & Shipping Co.,* 281 F. 2d 646 (6th Cir. 1960). Thus at the very least, despite the view expressed in the separate concurrence in *Fuhrman* that the determination ex-

pressed therein on this point and in *Spermacet* constituted obiter dictum, the quoted conclusion is here controlling as the law of the case. Accordingly, we are here required to affirm the District Court unless we conclude its finding to have been "clearly erroneous" under the definition provided by the Supreme Court:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum, supra,* at 395.

It is against this yardstick that we measure the evidence of compensatory damages contained in the record.

I. PERSONAL INJURY CLAIMS

For their experiences at the time of the sinking, and for their alleged physical and mental disabilities resulting therefrom, the seven personal injury claimants were awarded a total of $997,332. The individual awards ranged from $82,160 to $251,976, and included the following specific elements of damages: loss of earning capacity from the date of the accident to the date of judgment, and for future loss of earning capacity; pain and suffering experienced during the sinking, from the date of the sinking to the date of judgment, and for future pain and suffering; loss of life's pleasures from the date of the sinking to judgment, as well as future loss of life's pleasures; maintenance and cure to the date of judgment; and the cost of future medical services.

Before turning to a discussion of the specific elements of damages awarded to the personal injury claimants, a few comments of a general nature are deemed appropriate.

The first pertains to the nature of the Commissioners' Opinions and Awards themselves. Those Opinions and Awards, although designated by the Commissioners as their findings of fact and conclusions of law, are entirely unsatisfactory in that respect. Despite the fact that these cases present difficult and complex issues of past and future damages, depending in large part on conflicting medical and psychiatric testimony, the Opinion and Awards for each individual claimant consisted only of a brief review of that testimony together with the claimant's testimony, and concluded with a bare conclusory finding such as:

> "We determine that the claimant Idalski was injured on May 7, 1965 and was damaged thereby."

In each instance a statement of this nature is followed by a listing of the dollar amounts awarded for each of the elements of damages allowed to the individual claimants.

We recognize that this abbreviated aspect of the Commissioners' findings here would not alone be sufficient to require reversal, especially since the findings were concerned with the question of damages rather than liability. Compare *Ginsburg v. Royal Insurance Company,* 179 F. 2d 152, 153 (5th Cir. 1950) with *Matton Oil Transfer Corporation v. The Dynamic,* 123 F. 2d 999, 1000-01 (2d Cir. 1941). But such findings are of little aid to intelligent appellate review. The appellate court is left to presume that the Commissioners accepted the claimants' evidence and based their awards on some combination thereof, but if some of that evidence is found upon review to have been incompetent, the court can only speculate as to the degree to which such evidence influenced the Commissioners.

The next comment is less general in nature, but it pertains to a threshold issue common to each of the personal injury claims. To a very large extent the awards assigned

to the various elements of damages were grounded upon the testimony of claimants' psychiatric and orthopedic experts. With particular reference to claimants' psychiatric expert, shipowners argue that he was a part of a "circle of advocacy" otherwise composed of the claimants and their attorneys, and that his testimony should be discredited as it was by the Commissioner in the *Matter of the Petition of Keystone Tankship Corp. and Keystone Shipping Co.*, In Admiralty, No. 16,994, United States District Court for the Western District of Washington, Northern Division (the *Bunkerhill*). Were we sitting as the triers of fact, or were we not required by the law of the case as established in *United States Steel Corporation v. Fuhrman, Administratrix, supra*, to follow the rule of *Gypsum*, the inclination to so discredit his testimony would be strong upon us. In the existing circumstances, however, we are required to accept that testimony unless we possess "on the entire evidence . . . a definite and firm conviction that a mistake has been committed," or unless we conclude his pertinent testimony was inadmissible in the premises and improperly received in evidence.

Considering the credibility issue first, we find before us a record in which virtually all of the objective evidence is inconsistent with, if not actually diametrically opposed to, the opinions which the psychiatric expert was permitted to place in the record. These opinions are of a curiously similar pattern with reference to each of the personal injury claimants, almost always concluding that each seaman suffered indescribable horrors and has had his future life warped by a "post-traumatic anxiety neurosis"—resulting from a half hour's immersion in the waters over which they traveled for a livelihood. These opinions were based almost exclusively on interviews conducted for the purpose of preparing testimony for presentation to the Commissioners.

In many respects these expert opinions failed to take into account such circumstances as pre-accident complaints and medical treatment for some of the conditions thereafter existing, and in connection with the dire prognostications do not recognize post-accident promotions and actual increases in earnings, nor satisfactory home and occupational adjustments.

An illustrative example is that of claimant Stanley Mulka. Mulka was sailing for the first time on the trip which culminated in the sinking of the *Cedarville*. Prior to sailing he had attended four years of high school and the first year of college at a Roman Catholic seminary, studying for the priesthood. He then had doubts about continued study for the priesthood, and these doubts apparently caused academic problems. He left college on academic probation early in 1965.

After the sinking Mulka abandoned his short-lived sailing career. He worked the remainder of the summer of 1965 as a plumber's helper and returned to college in the fall of 1965. Upon his return to college, he embarked on a course of study to prepare him to be a school teacher. His grades showed a marked improvement after his return to college, almost all A's and B's and he received an excellent rating as a student teacher. At the time of the hearing below Mulka was set to graduate from college, and he was virtually assured of a position as a teacher. In addition to his participation in normal college social life such as fraternities and special interest clubs, he had a steady girl friend and indicated plans of marriage.

Although Mulka testified that he suffered from constant headaches since the date of the accident and that he also suffered constant, sometimes excruciating, pain in his back, arms and hands since the date of the accident, cross-examination disclosed that he had sought medical attention for

headaches prior to the sinking as well as after, but that he had not bothered to seek medical treatment for the "excruciating" pain in his back, arms or hands since the date of the accident.

Claimants' psychiatrist, testifying solely on the basis of the history and symptoms related to him by Mulka, stated that he found Mulka to have deteriorated emotionally and scholastically after the date of the accident. He diagnosed his condition as a "moderately severe anxiety neurosis" which would prevent Mulka from maintaining a job as a school teacher and would disable him to some extent in any occupation he undertook. Cross-examination disclosed to the psychiatrist for the first time many significant facts such as Mulka's academic improvement upon his return to college after the sinking, his excellent rating as a student teacher, and the fact that he had sought medical attention for serious headaches prior to the sinking, but the doctor saw no need to change his diagnosis.

Such factors form the basis for our dissatisfaction with this testimony, and applying the test of *Gypsum,* on the basis of the entire evidence, we express a definite and firm conviction that a mistake has been committed. However, we do not reject this testimony on this ground alone.

The rules under which doctors (as well as other experts) are permitted, as an exception to the general rule, to express opinions have been carefully formulated. The most important of those rules for present purposes is that a medical opinion based upon the history and subjective symptoms related to a doctor solely for the purpose of enabling him to testify at trial is inadmissible. *Nashville, C. & St. L. Ry. v. York,* 127 F. 2d 606, 611-12 (6th Cir. 1942); *Hardy-Burlingham Mining Co. v. Baker,* 10 F. 2d 277, 281 (6th Cir. 1926); *Baltimore & O. R. R. v. Mangus,* 294 F. 2d 761, 762 (6th Cir. 1924). *See Padgett v. Southern Ry.,* 396

F. 2d 303, 308 (6th 1968). Shipowners contend that since the remarkably similar diagnoses of each claimant's alleged psychiatric disturbance were based solely on the medical history and subjective symptoms related to the psychiatrist by the claimants in order to qualify him to testify in their behalf, that opinion testimony was inadmissible.

Claimants do not challenge the correctness of this rule as it applies generally to the diagnosis of physical complaints, nor do they challenge the shipowners' assertion that the psychiatric diagnosis common to each claimant was based on the history and subjective complaints related to the doctor to qualify him to testify at trial. Rather, they claim an exemption from the general rule, arguing that the diagnosis of psychic disturbances requires the evaluation of the patient's history and subjective complaints. Indeed, claimants contend that the history, subjective symptoms, attitudes and feelings elicited by the psychiatrist from his patient are the only bases for an evaluation and diagnosis of a psychiatric disturbance.

Whatever persuasive effect this argument might have is vitiated by the fact that it finds no support in the record, and certainly the bases for psychiatric diagnosis cannot be judicially noticed. If it is true that psychiatric evaluation must be based in large extent on subjective evidence, the time may come when a separate rule of law will evolve establishing different admissibility standards for opinions as to mental and physical disorders (or the absence thereof). However, if such a distinction is ever to be made, it must be on the basis of evidence justifying a different standard, which in turn must be established by the testimony of experts. No such testimony is contained in the present record,[3]

3. The only matter in the record remotely touching on this issue are the arguments of counsel at the time the objection to the admission of the psychiatric opinion testimony was made:

"Mr. Keig [Attorney for Den Norske]: Doctor, excuse me. I would like to object to the doctor testifying as to the history

and we will not substitute our lay judgment in this peculiarly nebulous field for evidence.

Even were we to accept the claimants' argument in this regard, it would meet only one of the reasons underlying the general rule outlined above, that of the objectionable hearsay nature of the doctor's narration of his patient's history and subjective complaints upon which his opinion was based. A separate but related policy reason for the rule is the exclusion of medical opinion testimony based on what may well be the self-serving declarations of the plaintiff to the examining doctor. See *Padgett v. Southern Ry., supra.* Where the plaintiff consults a doctor solely to qualify him to testify in his behalf at trial, any statements made to the doctor must be highly suspect as a basis for a diagnosis. This is particularly true where, as here, the complaint is

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he took from this man. The law is clear that examining physicians may not state the history and that their opinion must be based upon evidence otherwise adduced.

"The Commissioner: I think that a history is proper at this time. If he is the treating doctor and saw him on February 25th, 1967, obviously for the purpose of treatment, or as an analyst, or for the purpose of testifying as an expert, I think he can testify as to that.

"Mr. Keig: Mr. Commissioner, that is exactly the point, and you are right. The thing here is he did not see him for treatment, but solely for examination for the purpose of testifying and that forms the foundation for our objection, because the law is clear that in those cases he may not read his history.

"The Commissioner: Mr. Freedman. [Attorney for Claimants]

"Mr. Freedman: I don't offer the history which he obtained from the client as the truth of those statements. I offer them, as you said before—and this is consistent with the law, too. As a matter of fact, the law is universal on this point, that for the purpose of his making a diagnosis and drawing any kind of a conclusion, he needs to have the history, and to that extent it is very relevant."

Whereupon the objection was overruled and the doctor proceeded to testify as outlined above, diagnosing the psychic disturbances of the claimants on the basis of the history and subjective symptoms related to him by the claimants.

entirely subjective, the plaintiff has made no attempt to secure treatment for the complaint, and there is at least some divergence between the history and symptoms related to the doctor and those testified to under oath. Accordingly, we hold the psychiatric opinion testimony to have been improperly admitted in this case.

A somewhat different situation exists with respect to medical opinion testimony of physical impairment. Five of the personal injury claims, Holley, Idalski, Piechan, Przybyla and Tulgetske, offered the testimony of an orthopedic expert, who, like the claimants' psychiatric expert, was consulted by claimants solely for the purpose of enabling him to testify in their behalf at the hearing. At the outset of his testimony shipowners renewed their objection to the admission of any expert opinion testimony based upon the history related to the doctor by the claimant. Without explaining their inconsistent rulings, the Commissioners correctly ruled that the orthopedic expert would not be permitted to testify to the history given him by the claimants. In accordance with this ruling the orthopedist then testified to the symptoms observed by him during the examination of each claimant and stated his diagnosis of their various physical ailments based upon such observations. However, despite the ruling immediately prior thereto, with respect to the question of causation of the physical ailments he had diagnosed, the doctor was permitted to state that in his opinion they were caused by "an incident of May 7, 1965."

The admission of this opinion testimony of causation was error. Nothing in the record discloses the basis for the doctor's opinion as to causation other than the history related to him by the claimants in the course of their examination. As stated above, the opinion of an examining physician based upon the history related to him by the plaintiff is inadmissible. *Nashville, C. & St. L. Ry. v. York, supra; Hardy-Burlingham Mining Co. v. Baker, supra;*

Baltimore & O. R. R. v. Mangus, supra; Padgett v. Southern Ry. supra. However, the admission of this testimony was not fatal to the claimant's claims of physical impairment resulting from the sinking. In *Sentiles v. Inter-Caribbean Shipping Co.*, 361 U. S. 107 (1959), the Supreme Court held that the failure of any medical expert to testify that an accident aboard ship was the cause of a seaman's subsequent tubercular condition did not prevent the trier of the fact from inferring that the accident aboard ship was the cause. 361 U. S. at 109. We believe the erroneous admission of the opinion testimony of causation here creates a record in this case similar to that in *Sentiles:* no competent medical evidence of causation but sufficient evidence from which the Commissioners could infer that the physical disabilities diagnosed were caused by the sinking of the *Cedarville.*

In summary, with respect to the expert opinion testimony offered below in support of the claimants' allegations of physical and psychiatric disabilities, we are presented with a record which contains no competent evidence of psychiatric disturbances or disabilities but which does contain competent evidence of physical disabilities along with other evidence from which the Commissioners could properly infer a causal connection with the sinking of the *Cedarville.* It is with these principles in mind that we turn to a discussion of the individual elements of damages awarded by the Commissioners.

a. Pain and Suffering.

The most constant item in the Commissioners' awards is, as it is described therein, "Pain and suffering for the May 7th event." Four of the claimants were awarded $15,000 each for this item, while two (Idalski and Tulgetske) were allowed $10,000 each and one (Holley) was awarded $20,000.

As has been indicated above, the Commissioners' Opinions and Awards disclose little of the basis for such awards. Under the general caption "Pain and Suffering" they offer one lengthy but inappropriate quotation from American Law Reports but otherwise give no indication of the guidelines used in making their determination. Moreover, while Holley's situation is clearly distinguishable, it is difficult, if not impossible, to ascertain from the Commissioners' description of the experiences of the individual claimants during the sinking just what formed the basis for distinguishing Idalski's and Tulgetske's situation from those of the other four.[4]

The seven personal injury claimants were variously engaged at the moment of the collision of the *Cedarville* and the *Topdalsfjord*. Some were standing their regular watch; some were sleeping and were awakened by the noise and impact of the collision. However, all of the surviving claimants described the impact as relatively "soft," and none were injured by the impact of the collision itself. There then followed a period of time during which, despite the action of the crew members to halt it, the flow of water into the *Cedarville* rapidly increased. It therefore soon became apparent to the crew members that the *Cedarville* was going to sink and that it must be abandoned. In the resulting rush of events most of the crewmen were either thrown or required to jump into the water. They remained there for periods ranging from a few minutes to thirty to forty minutes before being picked up by their rescuers, but while in the water most were able to find their way to a life raft or a life boat within a matter of minutes.

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4. An explanation for this distinction may be found in the fact that, according to the Commissioners' Awards and Opinions, Commissioner Grogan "assumed specific responsibility" for the awards in the Idalski and Tulgetske claims, while Commissioner Schroeder "assumed specific responsibility" for all of the other claims.

A German ship, the *Weissenburg*, had been following the *Topdalsfjord* at a distance of about one mile, and its captain had "seen" the collision on his radar screen. The *Weissenburg* immediately moved into position to pick up the *Cedarville* crew, and, within the thirty to forty minute time period referred to above, all of the survivors had been taken aboard the *Weissenburg*. They were there given blankets, dry clothes and warm drinks. Soon thereafter they were transferred to the Coast Guard Cutter *Mackinac*, aboard which they went to Mackinac City, Michigan, and thence to Cheboygan, Michigan. With but one exception all of the survivors were taken to the Cheboygan Hospital for examination; Mr. Pieehan declined to go to the hospital.

Following examination, none of the claimants were found to require hospitalization, and all were returned to their homes the same afternoon. Claimant Holley, complaining of back pains, returned to the hospital that evening, however. He stayed there one night, underwent further examination, including x-rays, with negative results, and was released by the hospital the following day.

In spite of what can only be regarded as deficiencies in the disclosure of the basis for the Commissioners' Opinions and Awards, the awards to the individual claimants might be sustained on the basis of their individual testimony describing their personal experiences at the time of the sinking except for two factors. First, we regard the awards for pain and suffering on the occasion of the sinking as excessive. Second, we are clearly unable to conclude that the inadmissible but colorful testimony of the highly articulate psychiatric expert was not persuasive with the Commissioners. We thus have no alternative but to vacate these awards and to remand them for reevaluation and further findings on the basis of the present record exclusive of the incompetent psychiatric testimony.

Intervening chronologically between the pain and suffering items "For the May 7th event" and those for the future are the pain and suffering damages allowed for the four-year period from the sinking to the date of the District Court judgment, May 7, 1969. An award in the sum of $10,000 (on the basis of $2,500 per year) was allowed on this account to each of the claimants except for Idalski, who received a $12,000 award (on a $3,000 per year basis).

As in the case of the pain and suffering allowance "For the May 7th event", the Commissioners' Awards and Opinions set forth no satisfactory basis for the determination of these interim period awards (except that again Holley's situation is distinguishable and in Idalski's case, perhaps to justify the higher award made to him, passing mention is made of pains in the left leg, shoulder, shin and elbow area). However, also as in the case of the "For the May 7th event" awards, the fact remains that although there is some evidence in the record as to the claimants' discomfort for a past period, we conclude the amount of the awards to be excessive, and we are unable to say that the inadmissible testimony of the psychiatric expert was not a factor in the determination thereof. Thus these awards must also be vacated and remanded for further findings and reevaluation without such testimony.

The awards for future pain and suffering, which ranged from $5,000 to Mulka (50 years, his life expectancy, at $100 per year) to $35,200 to Tulgetske (10 years at $2,000 per year and 15.2 years at $1,000 per year, for a life expectancy of 25.2 years), present a similar picture. While the basis of the Commissioners' awards for pain and suffering experienced during the events surrounding the sinking and until the date of judgment is less than satisfactory, the direct evidence from the claimants themselves provides some support for the awards. An award of damages for future pain

and suffering cannot rest solely on the evidence of past pain and suffering, however. Competent medical testimony showing both diagnosis and prognosis is necessary before the trier of fact can reasonably find that pain and suffering will continue into the future.

As indicated above, all of the claimants here offered expert psychiatric testimony in support of their alleged future pain and suffering, and all but two of the claimants (Mulka and Kierzek) offered expert orthopedic testimony as additional support. Since we have already held, however, that the expert psychiatric testimony was improperly admitted into evidence and can provide no basis for any of the awards, to the extent that any award was based on such expert psychiatric testimony, it must fail. Accordingly, the awards to Mulka and Kierzek, being based solely on the incompetent psychiatric testimony, must fail completely. The awards to the other five claimants must fail in part also since it is clear that they were based in part on the incompetent psychiatric testimony. However, since, as has also been stated, it is impossible to discern from the Commissioners' Opinions and Awards the extent to which those awards were grounded upon the incompetent evidence, we again refuse to substitute our judgment for that of the Commissioners and instead vacate the awards and remand for further findings and reevaluation solely on the basis of the evidence here held to be competent.

b. Loss of Life's Pleasures.

The next category of awards, those for loss of life's pleasures, is closely related to the awards for pain and suffering in that evidence offered to support a claim for loss of life's pleasures generally parallels that required to support a claim for pain and suffering. Awards in this category have on occasion been made by courts to claimants

who, by reason of their injury, are deprived of the opportunity to participate in the normal activities, social, athletic or recreational, in which a person without such injury could engage. *See e.g., Hanson v. Reiss Steamship Company,* 184 F. Supp. 545 (D. Del. 1960); *Vastano v. Partownership Brovigtank,* 158 F. Supp. 477 (E. D. N. Y. 1957); *Yates v. Dann,* 124 F. Supp 125 (D. Del. 1954).

The Commissioners made awards in this category to each of the personal injury claimants ranging from $3,500 (to Mulka) to $65,200 (to Tulgetske). Here again the awards present the recurrent problem hampering appropriate appellate review in this case — the virtual absence of any indication from the Commissioners of their basis for the awards. To some extent the awards may have been based on the testimony of the claimants as to their inability to engage in certain activities since the date of the accident, but a study of the record precludes any conclusion but that the awards were also based in large part upon the diagnosis offered by claimants' pychiatric expert as to each claimant of a post-traumatic anxiety neurosis.

An illustrative example is that of claimant Jerome Kierzek. The only item in his testimony remotely connected to any impairment of his ability to enjoy the pleasures of life was his own testimony on direct examination that, following the sinking of the *Cedarville,* he acquired a fear of sailing which caused him to engage in heavy drinking. While it is doubtful that such testimony could be considered a proper basis for an award, even that basis is destroyed by his own testimony on cross-examination, which established that his drinking subsided shortly after his marriage a few months after the sinking. The remainder of his testimony provides no support for finding any reduction in any of his activities, social or recreational, or any domestic difficulties which could in any way be related to the sinking.

To the contrary, Kierzek's testimony showed, among other things, that he loved his wife and child, that he got along well with them, that he enjoyed going out socially with his wife (although his opportunity to do so was severely limited during his two years overseas duty in the U. S. Army), and that he had received five promotions during the course of his two year tour of army duty. Moreover, as stated above, Kierzek offered no expert medical opinion testimony of any physical disability caused by the sinking which would impair his ability to engage in the normal activities of a man of his age and situation. The only testimony in the record which even approximates a basis for the Commissioners' award to Kierzek for loss of life's pleasures appears in the incompetent as well as incredible testimony of the claimants' psychiatric expert:

> "Q. Will [this anxiety neurosis] affect his life's pleasures? A. Yes, sir.
>
> "Q. In what respect? A. In that certainly, he cannot have the usual, normal pursuit of happiness that all of us, I believe, are entitled to.
>
> "Mr. Keig: I would like to strike that conclusory statement. There is not one factual thing in that.
>
> "The Commissioner: I was listening for something factual, too.
>
> "Maybe he could give something factual as to how he is going to be denied life's pleasures.
>
> "Q. Will you answer that question, Doctor? A. Yes, sir. I don't believe that he would get the pleasure out of being with people that other people do. I don't believe that he is able to enjoy the pleasures of, say, going to a movie, bowling, organizations that many

men are accustomed to. I believe that he will not be as happy in his marriage as he would be without his anxiety neurosis."

As with the awards for pain and suffering, without the incompetent psychiatric opinion testimony as support, the awards for loss of life's pleasures are so grossly excessive as to be clearly erroneous. To the extent that any of the awards for loss of life's pleasures were based on the psychiatric testimony hereinabove held inadmissible, the awards must fail. A determination, however, of the validity of the awards in this group other than that to Kierzek requires a sifting and weighing of the evidence, a function more suited to the fact finder than to this court. Accordingly, we again vacate and remand for further findings and reevaluation, on the basis of the present record exclusive of the incompetent psychiatric testimony, the awards for loss of life's pleasures to each of the personal injury claimants other than Kierzek. We hold that the award to him *on this account is not supported by the record* as a matter of law.

c. Loss of Earning Capacity.

Two items of damages allowed to each of the personal injury claimants were for loss of earning capacity for the four year period from incident to judgment, and for the future, respectively. The awards made for the four year period may first be summarily disallowed. The Commissioners preface their determination of these awards with the abstruse statement, "The loss of earning capacity of the surviving seamen is measured by reasonable probability based upon evidence which permits the decison-maker to arrive at a pecuniary value of the loss." They then offer a resume of principles suggested as available for guidance

in the determination of such loss, but like the quoted statement, they are without present application because the record is utterly void of evidence which would thereunder justify an award to any of the present claimants. While this further circumstance would not necessarily be fatal to the claims, the fact is that the record establishes that with the exception of Mulka who returned to college shortly after the sinking and Kierzak who entered the Army in March 1966, both of which circumstances were unrelated to the sinking, each of the claimants was compensated on a higher basis during the four year period than that under which he had been receiving compensation either immediately prior to the sinking or for the four-year period immediately prior thereto. The formula for determining the amount of an award for loss of earning capacity in this Circuit was enunciated in *Imperial Oil Ltd. v. Drlik*, 234 F. 2d 4, 11 (6th Cir. 1956):

> "One who is injured in his person by the wrongful act of another may recover loss of time resulting therefrom and consequent loss of earnings, including future earnings, provided they are shown with reasonable certainty and are not merely speculative in character. The meaure of damages in this field is fairly definite, and *the amount awarded is controlled by what the evidence shows concerning the earning capacity of the injured person before and after the accident.*" (Emphasis supplied.)

The Commissioners, and thus the District Court which adopted their conclusions without independent elaboration, simply ignore this teaching of *Drlik* without reference thereto. Similarly, although the application of *Drlik* is argued in shipowners' main brief, the answering brief of the personal injury claimants (and of three of the death

claimants) makes only a passing comment to another aspect of *Drlik*.[5]

However we express reservations concerning the averaging out period used in *Drlik*. During one's progress through the working years of life his income normally shows at least some annual increase, with normally no decrease except as may be occasioned by personal or economic adversity until his declining years. For such use as it may be in the remand hereinafter directed, we therefore express the view that the base should be the higher of the year immediately preceding the incident or the average of the four years preceding it, unless the tortfeasor sustains the burden of showing that the single year was high for abnormal reasons. It was for that reason that we earlier observed that these claimants had not shown a decrease in earning capacity for the four year period following the sinking when compared either to earnings immediately prior thereto or to the average of the four pre-

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5. One brief filed in connection with one of the death claims inferentially attempts to discredit *Drlik* by arguing that it adopted the rule from two Second Circuit cases (*Porello v. U. S.*, 153 F. 2d 605 (1946) and *Carroll v. U. S.*, 133 F. 2d 690 (1943)), and then contending that these cases were subsequently overruled by *LeRoy v. Sabena Belgian World Airlines*, 344 F. 2d 266 (2d Cir. 1965). However, *LeRoy* is distinguishable on its facts and is entirely without present application. It is further argued that *Petition of Marina Mercante Nicaraguense, S. A.*, 248 F. Supp. 15 (S. D. N. Y., 1965), modified 364 F. 2d 118 (2d Cir. 1966)). (*The El Salvador*) reaffirmed the Second Circuit's rejection of *Drlik's* "averaging out" theory, but *The El Salvador* used the year prior to death as the base for awards, noting that these earnings were "consistent with . . . previous earning record[s]", and its conclusions are in no way inconsistent with those reached herein. The next year the Second Circuit in *Candiano v. Moore-McCormack Lines Inc.*, 382 F. 2d 961 (2d Cir. 1967), affirming the decision reported at 251 F. Supp. 654 (S. D. N. Y. 1966) approved the establishment of a claimant's earning capacity by averaging his earnings for the six years preceding the accident.

vious years,[6] and we restate the disallowance of those awards.

The problems faced in connection with future earning capacity are considerably more difficult than those involved in a consideration of earning capacity for a concluded period, as in this case the four years from incident to judgment. Where a past period is involved, in the absence of an affirmative showing to the contrary, the best evidence of earning capacity is the individual's actual earning record. As to the future, the same general principle of comparison of the claimant's earning capacity with and without injury applies. As the Second Circuit has stated:

> "The objective is to place the [claimant] in the same economic position as would have been his if the injury had not occurred. We seek to accomplish this goal by a formula which, stated in an oversimplified form, consists of determining what [claimant's] annual earning power would have been but for the injury, deducting what it will be thereafter, multiplying the result by [claimant's] [work life] expectancy, and discounting the product to present value." *Conte v. Flota Mercante Del Estado*, 277 F. 2d 664, 669 (2d Cir. 1960).

While the general formula is easily stated, its application, in the evaluation of future earning capacity is less easy. However, again some principles of general application can be stated. The claimant must first establish his normal annual earning capacity, which, in the absence of evidence of special circumstances indicating an ability to rise beyond his prior level of employment, would consist of a projection of claimant's earnings history, taking into account all available data relevant to wage adjustment. Next the claimant

6. In *Drlik*, to determine lost earning capacity this Court used as a base the average of the plaintiff's earnings for the four year period immediately prior to the accident.

must establish the reduction, if any, in his earning capacity proximately resulting from the injury by showing the existence of some condition which demonstrably limits his opportunities for gainful activity. See e.g., *Wiles v. New York, C. & St. L. R. R.*, 283 F. 2d 328, 331 (3rd Cir. 1960); *Conte v. Flota Mercante Del Estado, supra.* We gravely doubt that any such loss can be demonstrated from the record as to any of the present claimants, with the possible exception of Tulgetske and Holley, but once again it is impossible to tell from their Awards and Opinions what factual considerations motivated the Commissioners in this regard, and to what extent the emphatically articulated but inadmissible testimony of the psychiatric expert was persuasive. For this reason the awards made to all of the survivors for loss of future earnings will be vacated and remanded for further findings and reevaluation by the Commissioners.

d. Maintenance and Cure.

Awards for maintenance and cure to the date of judgment were made by the Commissioners to four of the personal injury claimants: Holley, Idalski, Przybyla and Tulgetske. The awards were calculated at the claimants' contractual rate of $8.00 per day for the 1461 days intervening between the date of the sinking and the date of judgment, less any days for which maintenance and cure had already been paid. Thus the award to each claimant was in excess of $11,000.

The principles of law governing an award for maintenance and cure are well settled. The law imposes a duty upon the master and owner of a vessel to provide his seamen with food and lodging if they should become sick or injured while in the ship's service. The duty begins with the inception of the disabling sickness or injury and con-

tinues until the seaman reaches maximum medical recovery. *Vaughan v. Atkinson*, 369 U. S. 527, 531 (1962). Presumably such time would normally be when the seaman voluntarily returns to work. The duty of the shipowner extends beyond the termination of the voyage, *Calmar S. S. Corporation v. Taylor*, 303 U. S. 525, 528 (1938), and it is not necessarily terminated by the seaman's resumption of some gainful employment if the shipowner has in effect forced the seaman to return to work by willfully ignoring his claim for medical attention. *Vaughan v. Atkinson, supra.*

Under the facts of this case we must conclude the awards to have been improper. As with so many of the other awards for the various elements of damage, it is once again difficult, if not impossible, to determine from the Commissioners' Opinions and Awards their basis for granting maintenance and cure. The itemization of the amounts awarded to the four claimants merely contains a cryptic notation such as:

> "He has not reached maximum medical recovery and is entitled to maintenance and cure at $8.00 per day for 1461 days."

The record suggests that, at least insofar as some of the claimants are concerned, the award was based on the testimony of claimants' expert psychiatrist who stated that the claimant was in need of psychiatric treatment from the date of the accident to the date of the hearing. Of course, to the extent any of the awards for maintenance and cure were based on the psychiatric opinion testimony, which we have hereinabove held incompetent, they must fail. The validity of the awards need not rest on whether they were based on the incompetent psychiatric testimony, however, because there is no objective evidence that any of the claim-

ants resumed gainful employment for reasons other than their voluntary determination to do so, nor is there any evidence that any of the claimants made any request for medical attention which was wilfully ignored by United States Steel.

> "A seaman by voluntarily working rather than using maintenance and cure to speed his recovery cannot by those tactics enhance the liability of the shipowner any more than the shipowner can be permitted to minimize his liability by refusing to pay and forcing the seaman back to work." *Pyles v. American Trading and Production Corporation,* 372 F. 2d 611, 619 (5th Cir. 1967).

Accordingly the awards to Holley, Idalski, Przybyla and Tulgetske for maintenance and cure to the date of judgment are vacated.

e. Future Medical Services.

Under the heading "Cost of Medical Services" the Commissioners awarded to each of the seven personal injury claimants amounts ranging from $1,560 (to Kierzek) to $15,600 (to Przybyla and Holley) for the stated purpose of permitting the claimants to receive weekly or bi-weekly psychiatric treatment at the rate of $30 per treatment, for periods ranging from two to five years.[7] Unlike most of the other awards, the basis for the Commissioners' awards for the cost of future medical services is clear. The award to each personal injury claimant was based upon the statement of claimants' psychiatrist that the individual claimant was in need of psychiatric treatment for the period of time

7. The award to Kierzek was an exception to the other awards. His award for future medical services was for the purpose of enabling him to pay weekly visits to a general practitioner rather than seeking psychiatric treatment because of his stated fear of psychiatrists.

for which the award was made. Accordingly, in light of our holding herein that the testimony of claimants' psychiatric expert was incompetent and improperly admitted into evidence, the awards for future medical services, being based upon that testimony, must be vacated.

f. Recapitulation as to Personal Injury Claims.

As had been determined in detail above, certain items included in the judgments entered on account of the personal injuries alleged have been determined to have been erroneously included as a matter of law. Items falling in this category are the losses of earning capacity attributed to each of the seven claimants for the four year period from the date of the sinking to that of judgment, maintenance and cure allowed four claimants (Pryzbyla, Holley, Idalski and Tulgetske) for the four year period, future medical expenses allowed to all seven claimants, loss of future earning capacity allowed to one claimant (Mulka), and for the alleged loss of life's pleasures to one claimant (Kierzek). On the remand hereinafter ordered the District Court is instructed not to allow damages on account of any of these items. On such remand the District Court is further instructed to make further findings and reevaluate every other allowance included in the judgments entered in favor of the various claimants, each of which allowances is specifically disapproved for the reasons hereinabove set forth. Such further findings and reevaluation shall be made on the basis only of the evidence herein held to have been properly received and in accordance with the principles herein enunciated.

II. DEATH CLAIMS.

The death claims present somewhat different issues than those which were presented in connection with the

personal injury claims. With few exceptions there is no dispute about the personal representatives' entitlement to the various elements of damage necessary to compensate them for the "deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased." *Cleveland Tankers, Inc. v. Tierney*, 169 F. 2d 622, 625 (6th Cir. 1948). Rather, the principal issues in the death cases turn upon the appropriate method of computation of those elements of damage in order to most accurately reflect the true value of the pecuniary loss to the decedents' families. The exceptions concern the awards against both United States Steel and Den Norske for pain and suffering undergone by the decedents in connection with the circumstances of their deaths and for the loss of care and guidance to the widows, and the award applicable only against Den Norske for loss of consortium and loss of care and guidance to the adult children under the Michigan Wrongful Death Act. These issues will be separately discussed.

a. Loss of Earning Capacity.

The primary element of pecuniary loss to the families of the deceased seamen is, of course, the loss of the decedent's earning capacity, both for the interim period between the date of death and the date of judgment and for the remainder of the decedent's work-life expectancy. The basic factor of the lost earning capacity is the monetary wage which the decedent would have earned had he lived, but earning capacity may also include the value of those fringe benefits which would inure to the benefit of the decedent's family had he lived.

In determining earning capacity loss from the date of death to the date of judgment, the Commissioners first appropriately looked to the decedents' actual earnings

prior to death and selected as a base the highest of each decedent's annual earnings for the five years prior to his death. That base figure was then increased by 4% to 5% per year for each of the four years between the date of death and the date of judgment, such increases representing the Commissioners' views of the annual wage rate increases which the decedents would have received in each of the years from 1965 to 1969. The Commissioners then added to the total of lost earnings so computed a factor ranging from 15% to 40% of such earnings for lost fringe benefits, and from the total of such lost wages and fringe benefits the Commissioners deducted a percentage ranging from 10% to 30%, representing the decedent's personal consumption of such earning capacity.

The Commissioners' computation of future earning capacity loss was similar in many respects to the computation of such loss for the four year period. The earnings base selected by the Commissioners represented an approximation of their prior estimate of each decedent's earnings for the year of judgment, i.e., 1969. That base was then multiplied by the decedent's work-life expectancy, with deductions for the decedent's personal consumption, and to the total thus reached, the fringe benefit factor of 15% to 40% was added. A percentage of 2% to 4% of that total was then added as representing "personal productivity improvement and general economic growth."

Issues are raised here concerning almost every step in the Commissioners' computations of earning capacity loss. Shipowners contend that the earnings base selected by the Commissioners for both the four year period and for the future was too high, that the Commissioners erred in assuming that the decedents would have received a wage rate increase of 4% to 5% for each year during the four year period and that the factors added in for fringe benefits and for "personal productivity and general economic growth"

were excessive. Shipowners also contend that the Commissioners erred in failing to make an adjustment to the awards for earning capacity losses for the value of social security and life insurance benefits payable upon the deaths of the decedents and by failing to make an adjustment for the impact of future income taxes upon such earning capacity. On the other hand, claimants contend that the deductions from the estimated lost earnings for the decedents' personal consumption was grossly excessive and that the Commissioners erred in computing the awards on the basis of work-life expectancy rather than full life expectancy, arguing that the decedents would have worked for the remainder of their full life expectancy.

Turning first to the question of whether the Commissioners erred in refusing to make an adjustment of their determination of earning capacity loss for the impact of social security and insurance benefits, as well as future income taxes, we hold that there was no error in the refusal to make those adjustments.

Social security and insurance benefits payable to the widows and minor children surviving the decedents, even though paid for in part by the decedents' employer, do not represent partial payment of the shipowners' liability for the loss to the families of the decedents' earning capacities. Rather, they represent receipt of private or governmental contract rights which became fully executed and payable upon death without regard to the cause of death, and contrary to shipowners' assertion refusal to allow an "offset" for such benefits does not require them to pay twice for the same loss. *See United States v. Harue Hayashi*, 282 F. 2d 599 (9th Cir. 1960). Shipowners' primary basis for their argument in favor of the adjustment is that the receipt of the social security and insurance benefits reduces the pecuniary loss to the survivors occasioned by reason of the deaths. Relying on the general principle of *Cleveland Tankers, Inc.*

v. Tierney, supra, they contend that they are liable only for the pecuniary loss to the deceased seamen's surviving families. However, upon such reasoning any reduction in the pecuniary loss to the widows or children occasioned, for example, by a widow's remarriage or entry into the labor market, could likewise be justified. As the Commissioners concluded, such benefits are irrelevant to the measure of the earning capacity loss suffered by reason of the seamen's deaths for which the shipowners are liable.

The question of whether an adjustment for the impact of income taxes upon the award for loss of earning capacity should be made presents separate issues. Obviously, the earnings which the decedents would have received in the future had they lived, which is the theoretical basis for the award, would have had federal and other income taxes deducted, and an initially plausible argument can be made that the true reflection of future earning capacity loss must be preceded by an adjustment to the award for such taxes. However, we do not find that argument persuasive because the impact of such future taxes can not be predicted with reasonable certainty. The infinite variations of exemptions and deductions coupled with the possibility of changes in the tax structure which could occur over the span of a decedent's life expectancy could materially alter the impact of the income tax, and any adjustment for income tax either with or without consideration of the possibilities for variation must constitute mere speculation on the part of the trier of fact. *See McWeeney v. New York, N. H. & H. R. R.*, 282 F. 2d 34 (2d Cir.), *cert. denied*, 364 U. S. 870 (1960); *cf. Sleeman v. Chesapeake & Ohio R. R.*, 414 F. 2d 305 (6th Cir. 1969). We therefore adopt the rule that no adjustment for income tax need be made "at the lower or middle reach of the income scale." *McWeeney v. New York, N. H. & H. R. R., supra; Petition of Marina Mercante Nicaraguense, S. A.*, 364 F. 2d 118 (2d Cir.), *cert. denied*, 385 U. S.

1005 (1967) (*The El Salvador*). We further hold that each of the anticipated future individual incomes involved in this case fall within that range and that the Commissioners' refusal to make an adjustment for income taxes did not constitute error.

We turn next to a consideration of the fringe benefits factor by which the Commissioners increased their awards for lost earning capacity by 15 to 40 percent. As in other instances, shipowners do not dispute the propriety of an award for fringe benefits. Rather they dispute the size of the awards and the Commissioners' failure to specify and evaluate each individual benefit included in the total. However, the record shows that both the shipowners and the claimants submitted extensive evaluations of each of the fringe benefits which would have been received by the decedents had they lived. The mere fact that the Commissioners converted the parties' evaluations of the benefits to percentages of the decedents' estimated lost wages for purposes of computation does not render the Commissioners' awards subject to attack for lack of specificity. Insofar as the size of the awards is concerned, the record shows that in some cases there is little variation in the parties' evaluations of the fringe benefit losses, and that in no cases are the Commissioners' awards beyond the range suggested by the parties' own evaluations.[8] While we might not have proceeded in the same manner had the initial decision been

8.

	Claimant's Percentage of Fringe Benefits to Earnings Loss	*Defendants' Percentage of Fringe Benefits to Earnings Loss*	*Commissioners' Percentage of Fringe Benefits to Earnings Loss*
Lamp	22%	19%	20%
Cook	20%	20%	20%
Fuhrman	16%	11%	15%
Haske	22%	10%	15%
Jones	62%	32%	40%

ours, both the percentages and the method of computation chosen by the Commissioners find support in the record, and it cannot be said that they are clearly erroneous.

Lastly we turn to the first element of the Commissioners' computation of earning capacity loss, i.e., the earnings base upon which such computations were made. As stated above, the Commissioners chose as their initial base for computation each decedent's highest annual earnings for the five year period prior to his death. As we have hereinabove indicated in connection with the personal injury claims, however, the base should be the higher of the year immediately preceding the incident or the average of the four years preceding it. We believe the Commissioners' selection of the highest of the decedent's annual earnings for the five years prior to death to have been clearly erroneous. Moreover, after having so selected the initial earnings base, the Commissioners assumed each decedent's gross earnings would have increased by 4% to 5% per year for each year from the year of death to the year of judgment. The only apparent basis for such assumption on the part of the Commissioners was the testimony of expert actuaries and economists which tended generally to show that all wages tend to increase from 5% to 6% annually as the result of increased productivity and inflation. However, in making the assumption, the Commissioners apparently ignored the documentary evidence in the record in the form of the collective bargaining agreements under which the decedents would have continued to have been employed had they lived. Those agreements showed that the annual wage increase which the hourly employees would have been entitled to receive in the four years from date of death to the date of judgment approximated 1½% per annum, not the 4% to 5% per annum increase found by the Commissioners. Accordingly we

hold that the earnings bases for the determination of earning capacity loss for both the four year period and for the future found by the Commissioners to have been clearly erroneous. In all other respects we find no error in the Commissioners' method of computation of earning capacity loss. The awards for earning capacity losses for both the four year period and for the future will be vacated and remanded for reevaluation in accordance with the foregoing.

b. Pain and Suffering.

As in the personal injury cases, the most constant item in the Commissioners' awards in the death cases was the award of $5,000 to each claimant for the pain and suffering undergone by each decedent prior to his death. Unlike the pain and suffering awards in the personal injury cases, however, the awards here present relatively uncomplicated issues upon review.

We note first that an award for pain and suffering is a proper element of damages in a Jones Act action for the recovery of the pecuniary loss resulting from the death of a seaman where it can be shown that the decedent experienced such suffering before his death. *St. Louis, I. M. & S. R. Ry. v. Craft,* 237 U. S. 648 (1915); *Cleveland Tankers, Inc. v. Tierney, supra* at 626. Therefore, the issue for our determination is whether there was any evidence from which the Commissioners could reasonably find that the decedents experienced pain and suffering in connection with their deaths.

Shipowners do not dispute the propriety of an award for pain and suffering, but they vigorously contend that no award for pain and suffering was justified in any of the death cases here because there was no evidence of any of the circumstances surrounding the deaths of the crewmen, much less any affirmative evidence that those crewmen experienced pain and suffering at that time. We disagree.

An eyewitness account of the circumstances of the deaths is not essential to such an award. Such evidence does, however, establish that some of the decedents were last observed performing their assigned duties below deck after the collision between the *Cedarville* and the *Topdalsfjord.* During this period of time the *Cedarville* was rapidly taking on water despite the efforts of the crew to halt it, thus permitting the inference that these decedents met their deaths by drowning in those inrushing waters while engaging in an unsuccessful struggle to save the ship. Moreover, it must be remembered that the survivors described the impact of the *Cedarville* and the *Topdalsfjord* as relatively "soft", thus permitting the further inference that it was unlikely that any of the decedents would have been rendered unconscious prior to their final moments. Other decedents were last observed on the deck or in lifeboats but presumably were hurled into the water as the ship capsized and sank. These circumstances, too, give rise to the almost inescapable inference that those crewmen died by drowning, and nothing in those circumstances suggests that they were rendered unaware of their fate. Under such circumstances, an award for pain and suffering cannot be said to be error. *See Grantham v. Quinn Menhaden Fisheries, Inc.,* 344 F. 2d 590 (4th Cir. 1965); *Petition of Marina Mercante Nicaraguense, S. A., supra,* 248 F. Supp. 15, 28 (S. D. N. Y. 1965) (*The El Salvador*); *Meehan v. Central R. R.,* 181 F. Supp. 594, 625-26 (S. D. N. Y. 1960).

Having thus determined that there was sufficient evidence from which the Commissioners could find that the decedents experienced pain and suffering prior to their deaths, our review with respect to this issue is closed. Despite claimants' assertion that the awards of $5,000 were adequate in light of the "excruciating and agonizing suffering that decedents experienced" and shipowners' implicit

argument that the amount was excessive, we will not attempt to substitute our judgment for that of the Commissioners. The awards for pain and suffering in the death cases will not be disturbed.

c. Loss of Consortium and Loss of Counsel and Guidance to the Widows and Loss of Love, Companionship and Guidance to the Adult Emancipated Children.

In the course of their determinations in the death cases, the Commissioners awarded sums to the widows of the deceased seamen for the loss of their husband's counsel and guidance and also for their loss of consortium, and sums to the adult emancipated children for the value of the love, companionship and guidance which those children would have received from their decedent. The propriety of these awards is the basic issue common to all.

As has been noted elsewhere, the jurisdictional basis for the death claims against the defendant United States Steel was the Jones Act, 46 U. S. C. § 688 (and by incorporation, the Federal Employers' Liability Act, 45 U. S. C. § 51 et seq.) because the deceased crewmen were employees of United States Steel. The basis for corresponding claims against defendant Den Norske was the general maritime law as supplemented by the Michigan Wrongful Death Act (M. C. L. A. § 600.2922), because of the absence of any employer-employee relationship between the decedents and Den Norske and the occurrence of the accident within the territorial waters of the State of Michigan. Under those statutes the liability of both defendants is limited to the pecuniary loss occasioned by the death of the family head, and the issue presented with respect to each of the above named items for which the Commissioners made awards is whether those items can properly be considered elements of pecuniary loss arising out of the decedents' deaths.

More specifically, the issue with respect to the awards for loss of counsel and guidance to the widows is whether loss of counsel and guidance is a proper element of pecuniary loss in a Jones Act action for damages by an administratrix of a deceased seaman.

The touchstone for any consideration of the propriety of an award in a Jones Act case for the loss of a decedent's counsel, care and guidance is *Michigan Central R. R. v. Vreeland*, 227 U. S. 59 (1913). In that case, an action under the Federal Employers' Liability Act, 45 U. S. C. § 51 et seq., to recover damages for the wrongful death of a railroad employee, the Supreme Court held that the trial court committed prejudicial error in permitting the jury to consider and award damages to the decedent's widow for the loss of the care and advice of her husband. After reiterating the rule that damages in an FELA action, as in a Jones Act action, are limited to the pecuniary loss incurred by reason of the decedent's death, the Court stated in relation to the charge therein that it "threw the door open to the wildest speculation. The jury was no longer confined to a consideration of the financial benefits which might reasonably be expected from her husband in a pecuniary way." 227 U. S. at 73. Since the Supreme Court's decision in *Michigan Central,* no case arising under the Jones Act to which we have been referred by the parties or which has been disclosed by our own research has permitted an award for the loss to the widow of the decedent's care and guidance. *See e.g., Petition of Marina Marcante Nicaraguense, S. A.,* 248 F. Supp. 15 (S. D. N. Y. 1965), *modified* 364 F. 2d 118 (2d Cir. 1966); *Petition of Oscar Tiedemann & Co.,* 236 F. Supp. 895 (D. Del. 1964); *Petition of Petroleum Tankers Corporation,* 204 F. Supp. 727 (S. D. N. Y. 1960); *Petition of Moore-McCormack Lines, Inc.,* 184 F. Supp. 585 (S. D. N. Y. 1960), *modified sub nom., Moore-McCormack Lines, Inc. v. Richardson,* 295 F. 2d 583 (2d Cir. 1961).

Notwithstanding the paucity of authority to support such an award, the claimants and the Commissioners seize upon certain language in *Michigan Central* to justify the awards, as follows:

> "It is not beyond the bounds of supposition that by the death of the intestate his widow may have been deprived of some actual customary service from him, capable of measurement by some pecuniary standard, and that in some degree that service might include as elements 'care and advice.' But there was neither allegation nor evidence of such loss of service, care, or advice." 227 U. S. at 74.

Claimants contend that here there were allegations and evidence of loss of care and advice and that the awards should therefore be permitted to stand. We disagree. The entire thrust of *Michigan Central* is that the pecuniary loss standard of FELA and Jones Act cases requires specific evidence of both the nature of the services lost and the cost of obtaining such services elsewhere. The Court stated:

> "[T]he word[s] [pecuniary loss] as judicially adopted [are] not so narrow as to exclude damages for the loss of services of the husband, wife, or child, and, when the beneficiary is a child, for the loss of that care, counsel, training and education which it might, under the evidence, have reasonably received from the parent, *and which can only be supplied by the service of another for compensation.*" 227 U. S. at 71. (Emphasis supplied.)

The Court further stated:

> "A minor child sustains a loss from the death of a parent, and particularly of a mother, of a kind altogether different from that of a wife or husband from

> the death of a spouse. The loss of society and companionship, and of the acts of kindness which originate in the relation and are not in the nature of services, are not capable of being measured by any material standard. But the duty of the mother to minor children is that of nurture, and of intellectual, moral and physical training, *such as when obtained from others must be for financial compensation.*" 227 U. S. at 73. (Emphasis supplied.)

We believe these excerpts must be read as limiting an award for loss of care and guidance to those cases in which the services of the decedent constituting such care and advice can be enumerated and their replacement value estimated. Here there was no evidence of the nature of the care, guidance or counsel which the decedents gave to their wives prior to their deaths which could "only be supplied by the service of another for compensation," much less any showing that any such care or counsel had any pecuniary value. Under such circumstances the award was improper and must be vacated. *Cf. First National Bank of Greenwich v. National Airlines, Inc.*, 288 F. 2d 621 (2d Cir.), cert. denied, 368 U. S. 589 (1961); *Meehan v. Central R. R.*, 181 F. Supp. 594 (S. D. N. Y. 1960).

The precise issue with respect to the Commissioners' awards for loss of consortium to the widows and for loss of love, companionship and guidance to the adult children, applied only against defendant Den Norske under the Michigan Wrongful Death Act, is whether the definition of pecuniary loss is to be governed by the principles of the general maritime law or by Michigan law interpreting that state's wrongful death statute. If the principles of general maritime law control, the awards for loss of consortium to the widows were improper because the general maritime law does not recognize that item as an element of pecuniary

loss. *Igneri v. Cie de Transports Oceaniques,* 323 F. 2d 257 (2d Cir.), *cert. denied,* 376 U. S. 949 (1964); *Simpson v. Knut Knutsen, O. A. S.,* 296 F. Supp. 1308 (N. D. Cal. 1969); *Valitutto v. D/S I/D Garonne,* 295 F. Supp. 764 (S. D. N. Y. 1969). But Michigan courts construing that state's wrongful death statute have permitted awards to widows for loss of consortium (e.g., *Montgomery v. Stephan,* 359 Mich. 33, 101 N. W. 2d 227 (1960)).[9]

While the question is one of first impression in this Court, we believe that under recent developments in the law the entire proceedings against Den Norske, including the measure of damages, are governed by the principles of maritime law.

The Commissioners' determination to apply Michigan law to the question of the measure of damages applicable to Den Norske appears to have resulted from their misplaced reliance upon certain language in *Michigan Central v. Vreeland, supra,* but that determination had some basis in light of the then existing state of the law. Prior to its decision in *Moragne v. States Marine Lines,* 398 U. S. 375 (1970), the Supreme Court had uniformly held that there was no liability for wrongful death under the general maritime law, and that absent a statutory right thereto, there could be no recovery by the next of kin of a decedent killed as the result of a maritime tort. Such was the rule of *The Harrisburg,* 119 U. S. 199 (1886), but its venerable teaching was specifically overruled by *Moragne v. States Marine Lines, supra.* Long before the overruling of *The Harrisburg,* the stringency of its rule denying recovery for

9. The awards to the adult emancipated children for loss of love, companionship and guidance need no further discussion as it is now clear that such an award is not an element of pecuniary loss under the Michigan Wrongful Death Act (*Breckon v. Franklin Fuel Co.,* 383 Mich. 251, 174 N. W. 2d 836 (1970), and there is no contention that such an award is a proper element of damage under the general maritime law.

wrongful death in admiralty under the maritime law led to the creation of exceptions to that rule. One of the judicially created exceptions to the stringent rule of *The Harrisburg* was that "where death . . . results from a maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given." *Western Fuel Co. v. Garcia*, 257 U. S. 233, 242 (1921).

The development and application of this exception to the general rule denying recovery inevitably led to questions of the appropriate substantive law to be applied where recovery was sought in one jurisdiction under a right created by another jurisdiction. In response, the courts fashioned a test of looking to the origin of the right sought to be enforced, holding that the court was bound to apply the law of the jurisdiction in which the right originated. *See The Tungus v. Skovgaard*, 358 U. S. 588 (1959); *Garrett v. Moore-McCormack*, 317 U. S. 239 (1942); *Curtis v. Garcia F Cie*, 241 F. 2d 30 (3rd Cir. 1957). While it does not appear that the Commissioners engaged in such a reasoning process in making their determination, application of the test set forth above could lead to the result that the measure of damages applicable against Den Norske was to be governed by the Michigan courts' interpretation of the Michigan Wrongful Death Act since, prior to *Moragne v. States Marine Lines*, *supra*, the claimants' right to recovery against Den Norske was rooted in that statute.

The decision of the Supreme Court in *Moragne v. States Marine Lines*, *supra*, which held that an action does lie under the general maritime law for wrongful death caused by a maritime tort, changes that result. Creation of a right of recovery for wrongful death under the maritime law eliminates the need for both the exception to the rule

denying recovery and for the tests designed to implement that exception and permits all facets of that right of recovery, including the measure of damages, to be governed by the principles of the maritime law. We therefore hold the awards for loss of consortium to the widows and for loss of love, companionship and guidance to the adult children, applicable only against Den Norske, to have been error. In so holding we recognize that in the proceedings below liability against Den Norske was premised upon the Michigan Wrongful Death Act. However, liability had never been in issue in this case, so the Supreme Court's creation of an additional or alternative basis for Den Norske's liability to the death claimants is of little importance compared to the pervasive issue with respect to all claims, i.e., the appropriate measure of damages. Recognition of a right of recovery for wrongful death under the general maritime law strongly dictates that in order to promote the uniformity and supremacy of the maritime law (*See Kossick v. United Fruit Co.*, 365 U. S. 731 (1961); *Southern Pacific Co. v. Jensen*, 244 U. S. 205 (1917)), the measure of recovery must be governed by the principles of that law where, as here, there is a conflict between the damages recoverable under the general maritime law (*Igneri v. Cie de Transports Oceaniques, supra; Simpson v. Knut Knutsen, O. A. S., supra; Valitutto v. D/S I/D Garonne, supra*) and those recoverable under state law (*Montgomery v. Stephan, supra*). Accordingly, upon the remand hereinafter ordered, the District Court is instructed not to allow damages to any claimants with respect to either loss of consortium to the widows or loss of love, companionship and guidance to the adult emancipated children.

d. The Awards of Prejudgment Interest and the Failure to Discount Future Damage Awards to Present Value.

The two remaining significant issues can be quickly disposed of since they represent instances of the Commis-

sioners' clear disregard of well established law of this Circuit.

In each of the death cases the Commissioners awarded prejudgment interest for the total dollar value of the awards from the date of death to the date of judgment. Such an award of prejudgment interest was error. *Cleveland Tankers, Inc. v. Tierney,* 169 F. 2d 622 (6th Cir. 1948).

The second issue concerns the Commissioners' failure to discount to present value the awards for future damages in all of the cases. The Commissioners' refusal to include in their computation of damages a reduction of future damages to present value was based upon their assumption that inflationary trends resulting in a loss in the purchasing power of the dollar by 4% per annum would offset any reduction to present worth at 4% simple interest. This was error. It is well settled that an award for future damages must be reduced to present value in order to take into account the earning power of that money. *Chesapeake & Ohio Ry. v. Kelly,* 241 U. S. 485, 491 (1916). It is equally well settled in this Circuit that the prospect of a future decline in the purchasing power of the dollar may not be used to offset the reduction to present value. *Sleeman v. Chesapeake & Ohio Ry.,* 414 F. 2d 305 (6th Cir. 1969).[10]

Accordingly, in conjunction with the remand hereinabove directed, the District Court is directed to discount to present value all awards for future damages in accordance with generally accepted actuarial principles.[11]

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10. In an attempt to salvage the Commissioners' determination that an offset was justified, claimants contend that the failure to discount to present value would be more than offset by future wage rate increases which they contend the Commissioners ignored. There is no competent evidence in the record to support this contention.

11. We recognize that the determination of the discount rate to be applied to an award for future damages rests within the sound discretion of the District Court. While we have serious reservations about a discount rate at 4% in light of the available return on investments today, we cannot say that the Commissioners' selection of

e. Recapitulation as to Death Claims.

Items in the death claims which we have hereinabove determined were erroneously included in the awards as a matter of law are the awards to the widows for the loss of consortium and for the loss of their decedent's counsel, care and guidance, the awards to the adult, emancipated children for loss of love, companionship and guidance and the award of prejudgment interest on the total value of the awards for the interim period between the date of death and the date of judgment. On remand the District Court is instructed not to allow damages on account of these items. On such remand the District Court is further instructed to reevaluate and recompute the earnings capacity loss of each death claimant in accordance with the principles herein enunciated, specific reference being to the determination of the proper earnings base for the computation of such earning capacity loss. The District Court is further instructed to discount to present value that portion of the award to each death claimant representing future damages in accordance with the principles herein enunciated. (Such instruction also has application to the personal injury claims; the District Court is similarly instructed to discount to present value that portion of the award to each personal injury claimant representing future damages.) In all other respects, no error is found to have intervened in the determination of damages in the death claims.

III. CONCLUSION.

The judgments of the District Court are vacated, and the causes are remanded for further proceedings consistent with the foregoing.

4% was an abuse of discretion. However, as pointed out above, such rate should be compounded in accordance with generally accepted actuarial principles.

APPENDIX E.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19835

IN THE MATTER OF:

PETITION OF
UNITED STATES STEEL CORPORATION
AS OWNER OF THE STEAMSHIP CEDARVILLE.

UNITED STATES STEEL CORPORATION,
Petitioner-Appellant,

v.

ALICE MARIE LAMP, ET AL.,
Claimants-Appellees.

Before: PHILLIPS, *Chief Judge*, WEICK and PECK, *Circuit Judges.*

Judgment.

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said

District Court in this cause be and the same is hereby vacated and the case remanded for further proceedings consistent with the opinion.

Each pa ty to pay his own costs on appeal.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

Filed Dec. 23, 1970.

ISSUED

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19837

IN THE MATTER OF:

THE PETITION OF
UNITED STATES STEEL CORPORATION

AND

PETITION OF DEN NORSKE AMERIKALINJE A/S,
OWNER OF THE M/S TOPDALSFJORD,
FOR EXONERATION FROM OR LIMITATION
OF LIABILITY.

UNITED STATES STEEL CORPORATION, ET AL.,
Petitioners-Appellees,

v.

BARBARA J. FUHRMAN, ADMINISTRATRIX OF THE ESTATE OF ARTHUR FUHRMAN, DECEASED, ET AL.,
Claimants-Appellants.

Before: PHILLIPS, *Chief Judge*, WEICK and PECK, *Circuit Judges.*

Judgment.

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby vacated and the case remanded for further proceedings consistent with the opinion.

Each party to pay his own costs on appeal.

Entered by order of the Court.

Carl W. Reuss,
Clerk.

Filed Dec. 23, 1970.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19839

IN THE MATTER OF:

THE PETITION OF
DEN NORSKE AMERIKALINJE A/S,
OWNER OF THE M/S TOPDALSFJORD,
FOR EXONERATION FROM OR LIMITATION
OF LIABILITY.

DEN NORSKE AMERIKALINJE A/S,
Petitioner-Appellant,

v.

ALICE MARIE LAMP, ADMINISTRATRIX OF THE ESTATE OF
FRANK D. LAMP, DECEASED, ET AL.,
Claimants-Appellees.

Before: PHILLIPS, *Chief Judge*, WEICK and
PECK, *Circuit Judges.*

Judgment.

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby vacated and the case remanded for further proceedings consistent with the opinion.

Each party to pay his own costs on appeal.

Entered by order of the Court.

Carl W. Reuss,
Clerk.

Filed Dec. 23, 1970.